Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO.

AMERICAN TRANSFER AND STORAGE COMPANY,
Petitioner

v.

RAYMOND J. BROWN,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

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October 17, 1980

QUESTIONS PRESENTED FOR REVIEW

1. Whether the application of a state consumer protection statute providing for treble damages and attorneys' fees to a claim for damages to an interstate shipment of goods conflicts with or obstructs the accomplishment and objectives of the Carmack Amendment to the Interstate Commerce Act, and therefore violates the supremacy clause of the United States Constitution.
2. Whether federal preemption under the Carmack Amendment as it relates to claims for damages in interstate moves, includes statements concerning the move made by the contracting agent prior to the execution of the contract of carriage documents, thereby precluding a different measure of damages under a state consumer protection statute.
3. Whether the treble damages and attorneys' fees provisions of the Texas Deceptive Trade Practices — Consumer Protection Act as applied in this case, conflict with the federal regulatory scheme under the Carmack Amendment providing for uniform rates for the transportation of goods in interstate commerce based on a predetermined uniform standard of liability for the carriers involved.

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AMERICAN TRANSFER AND STORAGE COMPANY,
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v.

RAYMOND J. BROWN,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

Petitioner, American Transfer And Storage Company, prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Texas entered in this proceeding on June 18, 1980.

OPINIONS BELOW

The decision of the Supreme Court of Texas is officially reported at 601 S.W.2d 931 and appears at Appendix A hereto. The opinion of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas, is officially reported at 584 S.W.2d and appears at Appendix B hereto.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the application of a state consumer protection statute providing for treble damages and attorneys' fees to a claim for damages to an interstate shipment of goods conflicts with or obstructs the accomplishment and objectives of the Carmack Amendment to the Interstate Commerce Act, and therefore violates the supremacy clause of the United States Constitution.
2. Whether federal preemption under the Carmack Amendment as it relates to claims for damages in interstate moves, includes statements concerning the move made by the contracting agent prior to the execution of the contract of carriage documents, thereby precluding a different measure of damages under a state consumer protection statute.
3. Whether the treble damages and attorneys' fees provisions of the Texas Deceptive Trade Practices — Consumer Protection Act as applied in this case, conflict with the federal regulatory scheme under the Carmack Amendment providing for uniform rates for the transportation of goods in interstate commerce based on a predetermined uniform standard of liability for the carriers involved.

JURISDICTION

The judgment of the Supreme Court of Texas was entered on June 18, 1980. Petitioner's Motion for Rehearing of the decision of the Supreme Court of Texas was overruled on July 23, 1980. (See Appendix C.) This petition for certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States,

Article VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Carmack Amendment to the Interstate Commerce Act,

49 U.S.C. § 20(11):

> Providing for full, actual loss, damage or injury unless the carrier shall have established and maintained rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property. (See Appendix D)

The Texas Deceptive Trade Practices — Consumer Protection Act,

> Vernon's Texas Codes Annotated, Bus. & C., § 17.46 et seq.:
>
> Declaring false, misleading, or deceptive acts or practices in the conduct of any trade or commerce unlawful and providing for an award of three times actual damages, court costs and reasonable and necessary attorneys' fees. (See Appendix E)

STATEMENT OF THE CASE

Respondent, Raymond J. Brown, contracted with Petitioner, American Transfer And Storage Company,

to ship his household goods from Texas to his new residence in Alaska. An Order for Services was signed by Petitioner and Respondent. Petitioner acted as agent for a freight forwarder, Columbia Export Packers, Inc., which issued the Bill of Lading. During the course of the move, involving several carriers and a steamship company, some of Respondent's household goods were either lost or stolen, and other goods were damaged. Respondent collected $11,000 under the Certificate of Insurance issued by Petitioner as agent for the insurance company. Respondent then brought suit against Petitioner under the Texas Deceptive Trade Practices — Consumer Protection Act in the State District Court in Dallas, Texas.

In his trial petition, Respondent alleged inter alia:

> Plaintiff would further show this Honorable Court that on or about June, 1974, Plaintiff engaged the services of Defendant, in his capacity as a common carrier, to move his household belongings and worldly possessions, along with his Vega automobile to his new residence in Fairbanks, Alaska. That Plaintiff delivered to the Defendant certain goods, household furnishings, personal effects, along with his 1974 Vega automobile to the Defendant for purposes of delivery to Alaska. (Transcript at 4).

Respondent also alleged that Petitioner's agent misrepresented the services included in the contract for moving his goods from Texas to Alaska.

Petitioner's trial answer incorporated the Order for Services and the Bill of Lading, each of which contained a limitation of liability based on released value.

Respondent offered proof at the trial as to the misrepresentations made by Petitioner's agent and proof of his damages. The Court admitted in evidence the Order for Services and the Bill of Lading only after the provisions pertaining to limits of liability based on a released value had been removed.

At the close of Respondent's case, Petitioner filed a Motion for a Directed Verdict on the grounds that Respondent's allegations were all directed towards statements made by an agent of the Petitioner in selling a move in interstate commerce, an area controlled exclusively by federal law. At that time Petitioner stated, "This being the case, we have at this juncture a purely interstate commerce case governed by the law of the United States," and "the State of Texas may not enact statutes that affect interstate commerce, enact statutes after the Federal governme has enacted legislation covering the same subject . . . ." (Statement of Facts at 378.) This Motion was overruled by the Trial Court. (Statement of Facts at 382.)

At the conclusion of the trial, Petitioner further excepted and objected to the proposed charge of the Court, stating "that the issues based on such pleadings constitute a burden on the Interstate Commerce and Plaintiff's cause of action, if any he has, is based on Federal law and not on State law . . . ." (Statement of Facts at 439.) Such exceptions and objections were overruled by the Trial Court. (Supplemental Transcript at 18.)

In its Motion for New Trial, Petitioner asserted that "[t]he United States of America has enacted legislation covering the subject matter of this lawsuit and the Texas Deceptive Trade Practices Act cannot affect

a claim covered by the federal legislation" (Transcript at 33-34); and "in this case the Texas Deceptive Trade Practices Act, must yield to the federal law which has occupied the field, including the Interstate Commerce Act 49 USCA, Section 20 (11)." (Transcript at 34.)

In its points of error in the Court of Civil Appeals, Petitioner's second point was:

> The error of the Court in entering judgment for damages which occurred in the interstate move of household goods and an automobile on the basis of a Texas statute when such damages were recoverable only under the provisions of the Carmack Amendment to the Interstate Commerce Act (49 U.S.C.A. § 20(11). (Brief of Appellant at 3.)

The Court of Civil Appeals overruled this point of error. 504 S.W.2d 284, 291.

In its Application for Writ of Error to the Supreme Court, Petitioner's point of error number one was:

> The Court of Civil Appeals erred in not holding that, on remand, the Respondent's claim for damages is controlled by the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 20(11) which, under the doctrine of preemption proscribed application of the Texas Deceptive Trade Practices — Consumer Protection Act under the allegations in this case. (Petitioner's Application for Writ of Error at 34.)

Writ of error was granted on this point; however, the Supreme Court of Texas held that the Carmack Amendment did not preempt the Texas Deceptive Trade Practices Act liability for "false, misleading or deceptive acts or practices that occurred before the contract of carriage was made." 601 S.W.2d 931, 938.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

If the opinion of the Supreme Court of Texas stands, then there cannot be a federal regulatory scheme providing for uniform rates for all shippers in interstate commerce. The contract of carriage with its liability based on released value will be meaningless. Without regard to the released value contained in the shipping documents, a shipper in Texas, by basing his claim not on the shipping documents but on oral representations made prior to the execution of the shipping documents, could recover treble damages and attorneys' fees. Thus, the originating carrier or originating agent will have exposure far in excess of that permitted by the Carmack Amendment based on tariffs which do not take into account the added liability. The local agent or initial carrier will be liable for loss or damage occurring anywhere between the point of origin and the point of destination. This is exactly what happened to the Petitioner in this case. Although prior to suit Respondent had recovered $11,000 under the Insurance Certificate issued by Petitioner, and although Petitioner was not shown to have caused any loss of or damage to Respondent's goods, Petitioner was nevertheless held liable for three times Respondent's damages, plus attorneys' fees, because some of Respondent's goods were lost, stolen or damaged somewhere between Texas and Alaska.

The Supreme Court of Texas did not follow the decisions of this Court which have dealt specifically with the Carmack Amendment and the preemptive nature

of the federal legislation. Instead, the opinions of the Supreme Court and the Court of Civil Appeals cite recent cases of this Court in other areas which have upheld local legislation in the face of a federal preemptive claim.

The Supreme Court of Texas in this case, held:

> The Court of Civil Appeals held the Carmack Amendment applied only to the liability of a carrier for its breach of contract, and the DTPA was a general statute, which provided remedies for persons victimized by false, misleading and deceptive acts within the police power of the state. Thus, the court concluded the prime object of the Carmack Amendment was to create a uniform rule of responsibility for interstate commerce and interstate commerce bills of lading, and that a DTPA suit for misrepresentation made prior to contract does not fall within the ambit of federal regulations.
>
> We agree with this holding of the Court of Civil Appeals for the reasons stated in its opinion. 584 S.W.2d 284-291. We also conclude the DTPA's prohibitions against false, misleading and deceptive acts protects a deeply rooted state interest and is an exercise of the right of the State of Texas to protect its citizens from acts such as those committed by American Transfer. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963). 601 S.W.2d 931, 938.

This holding of the Supreme Court of Texas is directly contrary to a long line of cases in this Court interpreting the degree of preemption of the Carmack Amendment, beginning with *Adams Express Co. v. Croninger*, 226 U.S. 491 (1912), where this Court stated:

That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue, and limits his power to exempt himself by rule, regulation, or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject, and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the state upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the state ceased to exist. *Id.* at 505-06.

* * * *

That such a carrier might fix his charges somewhat in proportion to the value of the property is quite as reasonable and just as a rate measured by the character of the shipment. The principle is that the charge should bear some reasonable relation to the responsibility, and that the care to be exercised shall be in some degree measured by the bulk, weight, character, and value of the property carried.

Neither is it conformable to plain principles of justice that a shipper may understate the value of his property for the purpose of reducing the rate, and then recover a larger value in case of loss. Nor does a limitation based upon an agreed value for the purpose of adjusting the rate conflict with any sound principle of public policy. *Id.* at 510.

The following cases of this Court held that by the 1906 amendment of Title 49 § 20(11), Congress legislated directly upon the carrier's liability for loss of

and damages to interstate shipments, and this and other federal legislation on the subject of interstate commerce is supreme and exclusive, and supersedes all state laws: *Chicago & N. W. R. Co. v. Whitnack Produce Co.*, 258 U.S. 369 (1922); *New York C. & H. R. R. Co. v. Beaham*, 242 U.S. 148 (1916); *Atchison, T. & S. F. R. Co. v. Harold*, 241 U.S. 371 (1916); *Boston, & M. R. Co. v. Hooker*, 233 U.S. 97 (1914); *Kansas City S. R. Co. v. Carl*, 227 U.S. 639 (1913); *Chicago, St. P., M & O. R. Co. v. Latta*, 226 U.S. 519 (1913).

In *Atchison, T. & S. F. R. Co. v. Robinson*, 233 U.S. 173 (1914), this Court specifically considered the preemptive scheme of federal regulation under the Carmack Amendment as it related to the validity of an oral agreement of carriage entered into prior to and at variance with the printed shipping contract. The Supreme Court of the State of Oklahoma had upheld the oral agreement since the shipper's attention was not called to the provisions of the printed shipping agreement which were at variance with the oral agreement. This Court reversed the Supreme Court of the State of Oklahoma, and held as follows:

> To give to the oral agreement upon which the suit was brought, the prevailing effect allowed in this case by the charge in the trial court, affirmed by the judgment of the supreme court of the state, would be to allow a special contract to have binding force and effect though made in violation of the filed schedules which were to be equally observed by the shipper and carrier. If oral agreements of this character can be sustained, then the door is open to all manner of special contracts, departing from the schedules and rates filed with the Commission. Kansas City Southern R. Co. v. Carl, 227 U.S. 652, 57 L.ed. 688, 33 Sup.Ct. Rep. 391. To

> maintain the supremacy of such oral agreements would defeat the primary purposes of the interstate commerce act, so often affirmed in the decisions of this court, which are to require equal treatment of all shippers and the charging of but one rate to all, and that the one filed as required by the act. 223 U.S. 173, 180-81.

While not all of the above cases were ignored by the Texas courts, they were not followed.

The Supreme Court of Texas agreed with the holding of the Court of Civil Appeals on the inapplicability of the Carmack Amendment and then cited only *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963). The Court of Civil Appeals opinion, while referring to *Adams Express Co. v. Croninger*, 226 U.S. 491 (1912) as being the leading case authoritatively construing the Carmack Amendment and while citing *Atchison, T. & S. F. R. Co. v. Harold*, 241 U.S. 371 (1916), refused to follow these cases and instead stated, "The most nearly analogous case we have found is *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960).

Neither *Florida Lime & Avocado Growers* nor *Huron Portland* dealt with the Carmack Amendment.

The Texas Courts simply could not sustain the Texas statute under the decisions of this Court defining the federal regulatory scheme under the Carmack Amendment, and instead the Court of Civil Appeals reached out and sought support in the *Huron Portland* case which upheld the right of the City of Detroit to prevent a ship, when docked in the city, from cleaning its fires and emitting smoke which in density and duration exceeded the Detroit Smoke Abatement Code.

This Court decided that the local ordinance for protection of the city's air did not interfere with legislation providing for federal inspection of steam vessels.

In *Florida Lime & Avocado Growers*, relied on by the Texas Supreme Court, this Court considered whether dissimilar state and federal regulations conflicted when they had different objectives and purposes. A California statute prohibited the transportation and sale of avocados in that state if they contained less than 8% oil by weight, excluding skin and seeds. On the other hand, the federal marketing order promulgated under the Agricultural Adjustment Act by the Secretary of Agriculture, did not take into account the oil content of avocados. This Court concluded that as the Congress intended to establish only minimum federal marketing standards, the state law did not conflict with the superintendence of the federal law and dual compliance was possible within the two schemes of regulation.

The two decisions of this Court cited by the Texas Courts are helpful in considering the preemptive nature of a federal statute which has not been before this Court; however, the preemptive nature of the Carmack Amendment and the inherent need for nationwide uniformity and federal primacy is well established by this Court's decisions, and these decisions should have been followed by the Texas Supreme Court.

The application of the Texas consumer protection statute to interstate shipment of goods, conflicts with the federal statute and interferes with its operation by providing a measure of damages based, not on the federally controlled contract documents, but on the

oral negotiations preceding the signing of those documents.

In summary, by act of Congress, a nationwide system of uniform freight rates and uniform treatment of shippers was long ago established. If the decision of the Texas Supreme Court is allowed to stand, that uniformity is destroyed.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Texas.

Respectfully submitted,

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October , 1980

A-1

Raymond J. BROWN, Petitioner,

v.

AMERICAN TRANSFER AND STORAGE COMPANY, Respondent.

No. B-8565

Supreme Court of Texas.
June 18, 1980.

Rehearing Denied July 23,1980.

Customer brought suit under Deceptive Trade Practices Act to recover against packer of household goods for damage to goods shipped from Texas to Alaska. The 162nd District Court, Dallas County, Dee Brown Walker, J., rendered judgment against packer for treble damages and attorney fees, and packer appealed. The Court of Civil Appeals, Guittard, C. J., 584 S.W.2d 284, reversed and remanded, and customer brought error. The Supreme Court, Campbell, J., held that: (1) collateral source rule was applicable so as to preclude packer from benefiting from fact that payment was made to customer under insurance policy; (2) issue whether packer was entitled to offset by reason of insurance payment was waived; (3) issue whether certain evidence was admissible was not properly before Court of Civil Appeals; (4) issues submitted were not so broad as to deny a fair trial, in light of fact that the submitted issues followed closely the wording of statute in question with alterations or deletions to conform issues to the pleadings and evidence; (5) Carmack Amendment did not preempt packer from being liable, under Deceptive Trade Practices Act, for false, mis-

leading or deceptive acts and practices occurring before contract of carriage was made; and (6) customer was not entitled to damages for mental anguish resulting from the loss.

Judgment of Court of Civil Appeals and judgment of trial could affirmed except for portion of judgment awarding recovery for mental anguish.

Garwood, J., concurred and filed opinion.

Steakley, J., dissented in part and filed opinion.

1. Damages — 59

Theory behind collateral source rule is that wrongdoer should not have benefit of insurance independently procured by injured party, and to which wrongdoer was not privy.

2. Damages — 64

In customer's suit under Deceptive Trade Practices Act to recover against packer of goods for damage to household goods shipped from Texas to Alaska, collateral source rule was applicable so as to preclude packer from benefiting from fact that payment was made to customer under insurance policy, in light of fact that policy was procured solely at customer's expense, that packer did not aid in procurement of policy except to issue policy, as insurance agent, and collect premium and that provision, within order for moving services, that "additional insurance is available to the shipper in the event he desires it" merely advised customer of a right which he already had. V.T.C.A., Bus. & C. § 17.41 et seq.

3. Damages — 59

If payment is within collateral source rule, principle forbidding more than one recovery for same loss is not applicable.

4. Pleading — 139

Right of offset is an affirmative defense, and burden of pleading offset and of proving facts necessary to support it are on party making the assertion. Rules of Civil Procedure, Rule 94.

5. Damages — 155

In suit to recover under Deceptive Trade Practices Act, issue whether defendand was entitled to offset by reason of insurance payment made to plaintiff was waived where there were no pleadings of offset. Rules of Civil Procedure, Rule 94; V.T.C.A., Bus. & C. § 17.41 et seq.

6. Appeal and Error — 205

Issue whether certain evidence was admissible was not properly before court of civil appeals on appeal where such evidence was not offered during course of trial or in bill of exceptions; fact that party asked that certain exhibits be attached as exhibits to the bill of exceptions did not constitute an offer.

7. Trial — 352.4(2)

Issues in deceptive trade practice cases for violations of statutory provision prohibiting representing that goods and services are of a particular standard, quality or grade or that goods are of a particular style or

model, if they are of another, should be submitted in terms as closely as possible as those actually used in the statute, but statutory language may be altered somewhat to conform the issue to the evidence of the case. V.T.C.A., Bus. & C. § 17.46(b); Rules of Civil Procedure, Rules 277, 279.

8. Trial — 352.4(2)

In customer's action against packer of goods in which recovery was sought under Deceptive Trade Practices Act for damage to household goods shipped from Texas to Alaska and in which it was found that packer represented that its services would include benefits and characteristics that they did not include and that the services were of a particular standard, quality or grade, when in fact they were not, issues submitted were not so broad as to deny fair trial, in light of fact that submitted issues followed closely the wording of applicable statute with alterations or deletions to conform issues to pleadings and evidence; there were no variances or defects justifying a different submission. V.T.C.A., Bus. & C. §§ 17.46(b), 17.46(b(5, 7); Rules of Civil Procedure, Rules 277, 279.

9. Trial — 352.5(1)

Rule, which provides that it is discretionary with court whether to submit separate questions with respect to each element of a case or to submit issues broadly and that it is not objectionable that a question is general or includes a combination of elements or issues, is intended to abolish practice of requiring submission of issues "distinctly and separately." Rules of Civil Procedure, Rule 277.

10. Appeal and Error — 1039(13)

To be reversible, variance between pleadings and proof must be substantial, misleading, constitute surprise, and be a prejudicial departure from the pleadings.

11. Trial — 366

An objection which states that an issue is global is insufficient. Rules of Civil Procedure, Rule 277.

12. Trial — 278

Though an issue need not be submitted "separately and distinctly," an objection to a charge must be made "distinctly" and "specifically." Rules of Civil Procedure, Rule 277.

13. Pleading — 430(1)

If there be a variance between pleadings and proof, the distinct and specific variance or other defect must be stated in the objection or it is waived. Rules of Civil Procedure, Rule 274.

14. Pleading — 237(5), 380

If objection is raised in regard to variance between pleadings and proof, trial court may permit an amendment, may include specified variances in a limiting instruction or may submit the issue broadly without any limiting instruction depending on the nature of the pleading, the evidence and materiality of the variance. Rules of Civil Procedure, Rules 66, 274.

15. Commerce — 62.12

Carmack Amendment did not preempt packer of goods from being liable, under Deceptive Trade Prac-

tices Act, for false, misleading or deceptive acts and practices occurring before contract of carriage was made. Interstate Commerce Act, § 20(11), 49 U.S.C. (1976 Ed.) § 20(11); V.T.C.A., Bus. & C. § 17.46(b)(5, 7).

16. Consumer Protection — 40

"Actual damages," within meaning of Deceptive Trade Practices Act provision for recovery of actual damages, means damages recoverable at common law. V.T.C.A., Bus. & C. § 17.41 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

17. Damages — 50.10

Mental suffering is compensable in suits for willful torts.

18. Damages — 49.10

Customer, who, in a suit brought under Deceptive Trade Practices Act, sought to recover against packer of household goods for damage to goods shipped from Texas to Alaska, was not entitled to recover damages for mental anguish allegedly resulting from the loss where there was no allegation that the wrongful action was willful and there was no resulting physical injury. V.T.C.A., Bus. & C. § 17.41 et seq.

Adams & Mims, Carl David Adams, Dallas, for petitioner.

Golden, Potts, Boeckman & Wilson, Duncan Boeckman, Dallas, for respondent.

CAMPBELL, Justice.

This is a deceptive trade practices case. The trial court rendered judgment for Plaintiff Brown, based on a jury verdict. The Court of Civil Appeals reversed the trial court's judgment and remanded for a new trial. 584 S.W.2d 284. We reverse the judgment of the Court of Civil Appeals and affirm the judgment of the trial court except that part of its judgment which awarded recovery for mental anguish. The trial court's judgment is otherwise affirmed.

In July 1974, Brown contacted American Transfer to determine the services offered in a move of household furniture and goods, and automobile, from Irving, Texas, to Fairbanks, Alaska. Joe Stanton, a salesman for American Transfer, went to Brown's home, surveyed its contents and described the services offered. Stanton represented the furniture and goods would be packed securely in wooden vaults or crates in Brown's presence; the containers would not be opened or tampered with until delivered to the Browns' Fairbanks home; the automobile would be shipped separately; and, the furniture would be unpacked and placed in the Fairbanks house at Brown's direction. Relying on these representations, Brown contracted with American Transfer for shipment.

These representations were contrary to American Transfer's actual method of operation. American Transfer's employees packed the furniture and goods as represented; but at American Transfer's Dallas warehouse and without Brown's knowledge, they removed the furniture and goods from the wooden containers. The furniture and cardboard boxes containing Brown's

other possessions were then packed in one sealand container in a "Loose Pack" with the automobile.

Most of the items shipped were badly damaged or missing. The automobile had been driven 1200 miles and had been wrecked. Additionally, the practice of the terminal carrier was to set the furniture and cardboard containers in the house and not to unpack the furniture and goods and place them as directed, as was represented to Brown.

American Transfer was not an interstate carrier but served as an agent for interstate carriers and as a packer of goods for interstate shipment. Interstate authority is not required to accept goods, turn them over to a freight forwarder for shipment, and collect for all the charges up and down the line. The freight forwarder, Columbia Export Packers, Inc., issued its household bill of lading and freight bill covering the transportation of Brown's possessions. The bill of lading and the order for services signed by Brown limited American Transfer's damages to 30¢ per pound of the weight of the goods shipped or $25 per article. The order for services also provided that Brown would arrange additional insurance if desired. Brown secured insurance from Insurance Company of North America (INA) and collected $11,009.22 under the policy.

A jury found American Transfer represented to Brown that the moving services of American Transfer (1) would include benefits and characteristics which they did not include; and (2) were of a particular standard, quality or grade, when in fact, they were not. The jury found damage to Brown's household goods and furniture of $18,434.00; cost of repair of the car

was $1,059.22 and $5,000.00 damages from mental anguish. The trial court rendered judgment against American Transfer for treble damages and attorney's fees.

We are to determine whether

(1) the collateral source rule is applicable to the INA payment;

(2) American Transfer pleaded the existence of any contract entitling it to the benefit of the INA payment or offset by reason of such insurance payment;

(3) the INA policy or the payment thereunder was admissible in evidence as an admission by Brown of the extent of his damages;

(4) American Transfer's objections to special issues were preserved for appellate review;

(5) Brown's claim for damages is controlled by the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 20, ¶(11) which, under the doctrine of preemption, proscribes application of the Texas Deceptive Trade Practices — Consumer Protection Act (DTPA) to limit Brown's damages to 30¢ per pound of the weight of the goods shipped; and

(6) damages for mental anguish are recoverable under the DTPA.

COLLATERAL SOURCE AND DOUBLE RECOVERY

The order for moving services, provided by American Transfer, limits its liability to 30¢ per pound per article and to $25 total claim per article. The order further provides "I will arrange additional insurance if desired."

Brown desired additional insurance and provided in the order for $26,100.00 of coverage at a premium of $552.00 Brown's wife signed the order, paid the premium, and was issued a "Transit-Pak" certificate of insurance by American Transfer, as agent for INA. The INA certificate excluded subrogation against American Transfer.

The bill of lading and freight bill issued by American Transfer as agent for Columbia Export Packers, Inc. also limits the carrier's liability to 30¢ per pound and states "additional insurance is available to the shipper in the event he desires it." However, Brown did not sign this document until the goods were delivered in Alaska.

Brown filed a written claim with INA and was paid $10,000.00 for loss and damage to furniture and goods and $1,009.22 for damages to the car. American Transfer contends it should receive the benefits of the insurance payment and the Court of Civil Appeals agreed. We disagree.

[1] The theory being the collateral source rule is that a wrongdoer should not have the benefit of insurance independently procured by the insured party, and to which the wrongdoer was not privy. *Texas & Pacific Ry. Co. v. Levi & Bro.*, 59 Tex. 674 (1883). Levi's cotton, stored in the Levi yards adjacent to the tracks, was destroyed by fire caused by negligence of the railroad. Levi collected insurance on the cotton under a policy secured by it and on which it had paid the premiums, and then sued the railroad for damages. The railroad's defense was Levi had been compensated for the loss under a fire insurance policy. The court held:

> If the cotton had been fully paid for by insurance companies under policies which had been paid for

> by the [Levis], it is not perceived how that could in any manner affect the liability of the [railroad]. Such payment would be the result of contract with which [the railroad] has no privity, and to which, in no respect, had it made any contribution.
>
> The insurer and the defendant are not joint tortfeasors or joint debtors so as to make the payment or satisfaction by the former operate to the benefit of the latter, nor is there any legal privity between the defendant and the insurer so as to give the former the right to avail itself of a payment by the latter. The policy of insurance is collateral to the remedy against the defendant, and was procured solely by the plaintiff at his expense, and to the procurement of which the defendant was in no way contributory. . . . It cannot be said that the plaintiff took out the policy in the interest or behalf of the defendant, nor is there any legal principle which seems to require that it be ultimately appropriated to the defendant's use and benefit.

[2] The *Levi* opinion is controlling. Payment to Brown by INA was the result of a contract to which American Transfer had made no contribution and was not privy. INA and American Transfer were not joint tortfeasors or joint debtors. The INA policy was procured solely at Brown's expense. American Transfer did not aid in the procurement of the policy except to issue the policy, as an insurance agent, and collect the premium. The provision in the order stating "additional insurance is available to the shipper in the event he desires it" is not contractual. It advises Brown of a right which he already has and is no more than a warning. There is nothing to indicate that Brown obtained the policy for American Transfer's benefit.

There is no legal principle to require the proceeds be appropriated to American Transfer's benefit for violations of the Deceptive Trade Practices Act (DTPA).

The collateral source rule was not applied in *Publix Theatres Corporation v. Powell*, 123 Tex. 304, 71 S.W.2d 237 (1934). Powell, lessor, by written contract, required Publix, lessee, to keep the property insured, for at least $20,000.00, with loss, payable to lessor. Fire destroyed the building, and lessor, after payment of $20,000.00 by the insurance company, sued lessee for the loss of the building. This Court held to permit the lessor to keep the insurance money and also collect from the lessee would be a double recovery not sanctioned by law. The lessee is liable for the result of his negligence but when he has provided for those damages, either by personal payment or insurance payment, the damage claim has been satisfied. The contract required insurance, which was to be paid by lessee, and the parties were in privity with each other by reason of the contract. The facts in *Publix* are distinguishable from Brown; however, the reasoning is helpful in demonstrating the application of the rule.

In *Wichita City Line v. Puckett*, 156 Tex. 456, 295 S.W.2d 894 (1956), a lease agreement provided "Lessor agrees to carry his own insurance against loss by fire, etc., on the entire building." The Bus Lines, lessee, contended the insurance purchased by Puckett was for the benefit of both, and that Puckett could not recover from the Bus Lines after receiving the insurance payment. This Court held the collateral source rule applied because the insurance provision did not impose an obligation on the lessor to protect himself, or the lessee, by insurance; an amount of insurance was not specified;

and, there were no specific terms designed to protect the lessee. The Court stated, "To be given the effect of exonerating the lessee the contractual provision must be clear and unambiguous and will be strictly construed against such effect if any other meaning may reasonably be ascribed."

[3] The collateral source rule applies to the INA payment to Brown. If payment is within the collateral source rule, the principle forbidding more than one recovery for the same loss is not applicable.

FAILURE TO PLEAD OFFSET

Brown contends the Court of Civil Appeals erred in considering insurance benefits because American Transfer failed to plead any contract or agreement that would entitle it to an offset or credit against Brown's damages by reason of such offset. It is provided in Rule 94[1] that in pleading to a preceding pleading a party shall set forth affirmatively matters constituting an affirmative defense. American Transfer's pleading merely recite the existence of insurance and the payment of insurance proceeds to Brown. It does not plead any contract whereby Brown agrees the INA payment would be available to American Transfer or that the payments should be offset.

American Transfer has not briefed this point. It states in its brief that a copy of the Household Goods Bill of Lading and Freight Bill, issued by Columbia Export Packers, Inc., was attached to the pleading and the attachment contains the contractual language applicable to the insurance payment. However, only a

1. All Rule references are to Texas Rules of Civil Procedures.

copy of the front side of the bill of lading was attached and the language on which it relies is on the back side. There are no pleadings of offset.

[4, 5] The right of offset is an affirmative defense. The burden of pleading offset and of proving facts necessary to support it are on the party making the assertion. *Southwestern Bell Telephone Co. v. Gravitt*, 551 S.W.2d 421 (Tex.Civ.App. — San Antonio 1977, writ ref'd n. r. e.). The point is waived.

EVIDENCE

[6] The trial court, by order in response to a motion in limine prohibited American Transfer from making any mention or interrogation that Brown had purchased insurance to compensate him for damages or that he had received compensation from any insurance company for all or part of his damages without first approaching the bench and obtaining a ruling from the court. American Transfer argued, in the Court of Civil Appeals, that Brown's claim and acceptance of a smaller amount than asserted as damages in the trial court was admissible into evidence because it was an admission that the amount of damages to his goods was not as great as that now claimed. The Court of Civil Appeals held the evidence admissible. However, that point was not before the court as American Transfer did not offer this evidence to the trial court during the course of the trial or in the Bill of Exceptions. In the Bill, American Transfer asked that Exhibits 5 (proof of loss) and 6 (loan and trust receipt of INA) be attached as Exhibits to the Bill. This does not constitute an offer. A ruling of the trial court to the admissibility was not obtained. American Transfer has waived this point.

SPECIAL ISSUES

The jury found that American Transfer represented to Brown that the moving services of American Transfer (1) would include benefits and characteristics which they did not include, and (5) were of a particular standard, quality of grade, when in fact they were not. The jury also found each representation to be a producing cause of damage to Brown.

The only objection to the issues made in the trial court, which was preserved in the Court of Civil Appeals, was that the issues were so broad they denied a fair trial. Because it had reversed the case on other grounds, the Court of Civil Appeals did not consider this point. However, that court, in an advisory opinion, directed the manner of submission of issues in deceptive trade practices cases.

The Court of Civil Appeals stated that *Spradling v. Williams*, 566 S.W.2d 561 (Tex. 1978), required issues to inquire whether the particular act or practice alleged occurred. It also stated that the issues submitted by the trial court which followed closely the wording of the statute, asked legal questions rather than making factual inquiries. We disagree.

The opinion in *Spradling* held the jury finding "Spradling represented the boat in question was a 1973 model boat built in 1973," is the same act or practice listed in 17.46(b) which provides:

> Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.

Therefore, it was not necessary to submit an issue whether the representation was deceptive or to so instruct the jury. The *Spradling* opinion did not suggest that issues inquiring whether specific representations occurred was the exclusive method of submission.

It is provided in Rules 277 and 279:

> It shall be discretionary with the Court whether to submit separate questions with respect to each element of a case or to submit issues broadly. It shall not be objectionable that a question is general or includes a combination of elements or issues (Rule 277).
>
> When the Court submits a case upon special issues, he shall submit the controlling issues made by the written pleadings and the evidence . . . . (Rule 279).

[7] Issues in deceptive trade practice cases for 17.46(b) violations should be submitted in terms as close as possible to those actually used in the statute. The language of the statute may be altered somewhat to conform the issue to the evidence of the case. *See Pope and Lowerre*, 11 St. Mary's L.J. 1 (1979).

[8] The statutes involved are 17.46(b)(5) and 17.46(b)(7). They provide:

> (5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not;
>
> (7) representing that goods or services are of a particular standard, quality or grade or that goods

are of particular style or model, if they are of another.

The submitted issues follow closely the wording of the statute with alterations or deletions to conform the issues to the pleadings and evidence. Therefore the broad form submitted in the instant case was proper.

[9] The amendment of Rule 277 in 1973 was designed to abolish the practice which required the submission of issues "distinctly and separately." Our decision in *Scott v. Atchison, Topeka, and Santa Fe Ry. Co.*, 572 S.W.2d 273 (Tex.1978), has been misconstrued by some judges and writers as a retreat from the revised rule which says: "It shall not be objectionable that a question is general or includes a combination of elements or issues." *Scott*, as we explained in the opinion itself and repeated in *Siebenlist v. Harville*, 596 S.W.2d 113 (Tex.1980), was a case in which there was a "wide variance" between what plaintiff pleaded and the evidence he produced at trial. He failed to produce any evidence on pleaded acts; he produced an abundance of evidence on six or seven unpleaded acts. A case could hardly be wider than that found in *Scott*.

[10] Variance between pleadings and proof has rarely been the source of harmful error. To be reversible the variance must be substantial, misleading, constitute surprise, and be a prejudicial departure from the pleadings. *Stone v. Lawyers Title Ins. Corp.*, 554 S.W.2d 183 (Tex.1977); *Gulf, C. & S.F. Ry. Co. v. Witte*, 68 Tex. 295, 4 S.W. 490 (1887); *Orgain v. Butler*, 478 S.W.2d 610 (Tex.Civ.App. — Austin 1972, no writ.); *McPherson v. Billington*, 399 S.W.2d 186 (Tex.Civ.App — Amarillo 1965, no writ); *Glens Falls Ins. Co. v. Vetrano*, 347 S.W.2d 769 (Tex.Civ.App. — Houston 1961, no

writ); *Lumbermen's Ins. Corp. v. Jones*, 311 S.W.2d 873 (Tex.Civ.App. — Fort Worth 1958, writ ref'd n.r.e.). We repeat what we noted in *Siebenlist*, "we are not to be understood as holding that a broad submission of an issue will be reversed simply because one or more acts which contributed to the injury was not particularly pleaded or proved."

[11-14] An objection to an issue which states that it is global, as was done in this case, is no good. While an issue no longer need be submitted "separately and distinctively," an objection to a charge must be made "distinctly" and "specifically." If there be a variance between pleadings and proof, the distinct and specific variance or other defect must be stated in the objection or it is waived. Rule 274, Tex.R.Civ.P. The court at that stage may permit an amendment under Rule 66; it may want to include the specified variances in a limiting instruction, or it may submit the issue broadly without any limiting instruction depending on the nature of the pleading, the evidence and the materiality of the variance. In the instant case we do not find any variance between pleadings and proof or other defect that would justify a different submission than the trial court used.

THE CARMACK AMENDMENT

[15] The Carmack Amendment regulates claims for damages to freight shipped in interstate commerce and prohibits states from limiting or expanding a carrier's liability to a shipper. 49 U.S.C. § 20(11). Brown contended the liability of the packing company rested solely on the DTPA and not on the contract of carriage. He alleged he had been induced into the contract for carriage by American Transfer's misleading and decep-

tive representations and because of the misrepresentations he had been damaged. American Transfer argued that its representations to Brown arose out of the contract for interstate shipment which was governed exclusively by the Carmack Amendment. Thus, the controlling issue is whether the Carmack Amendment pre-empts DTPA's liability for false, misleading or deceptive acts and practices that occurred before the contract of carriage was made.

The Court of Civil Appeals held the Carmack Amendment applied only to the liability of a carrier for its breach of contract, and the DTPA was a general statute, which provided remedies for persons victimized by false, misleading and deceptive acts within the police power of the state. Thus, the court concluded the prime object of the Carmack Amendment was to create a uniform rule of responsibility for interstate commerce and interstate commerce bills of lading, and that a DTPA suit for misrepresentation made prior to contract does not fall within the ambit of federal regulations.

We agree with this holding of the Court of Civil Appeals for the reasons stated in its opinion. 584 S.W.2d 284-291. We also conclude the DTPA's prohibitions against false, misleading and deceptive acts protects a deeply rooted state interest and is an exercise of the right of the State of Texas to protect its citizens from acts such as those committed by American Transfer. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963).

MENTAL ANGUISH

To support the allegation of mental anguish resulting from the loss, Brown testified that his wife's social life

was limited because she had no transportation; she was upset all the time; and it was "getting wearing on her nerves because we couldn't get replacements and fix up the house the way it should have been." Brown did not allege a willful tort.

[16] We agree with the Court of Civil Appeals that this evidence will not support an award of damages for mental anguish under the DTPA. The Act provides for recovery of actual damages. Actual damages means those recoverable at common law.

[17] In *Harned v. E-Z Finance Co.*, 151 Tex. 641, 254 S.W.2d 31 (1953), this Court refused to adopt the "new tort" of intentional interference with peace of mind which permits recovery for mental suffering in the absence of resulting physical injury or an assault and battery. The *Harned* case recognized the well-established rule that mental suffering is compensable in suits for willful torts "which are recognized as torts and actionable independently and separately from mental suffering or other injury."

[18] The requirement of a willful tort was again stated in *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627 (Tex. 1968). This Court held, "Damages for mental suffering are recoverable without the necessity for showing actual physical injury in a case of willful battery because the basis of that action is the unpermitted and intentional invasion of the plaintiff's person and not the actual harm done to the plaintiff's body."

The Browns are not entitled to damages for mental anguish as there was no allegation that the wrongful

action that caused the suffering was willful, and there was no resulting physical injury.

We reverse the judgment of the Court of Civil Appeals and affirm the judgment of the trial court except that part of its judgment which awarded recovery for mental anguish. The judgment is modified to deny recovery for mental anguish. The trial court's judgment is otherwise affirmed.

Concurring opinion by GARWOOD, J.

Dissenting opinion by STEAKLEY, J.

CONCURRING OPINION

GARWOOD, Justice.

I concur in the result with respect to the question of American's entitlement to offset or credit on account of the insurance proceeds collected by Brown. The case of *Wichita City Lines v. Puckett*, 156 Tex. 456, 295 S.W.2d 894 (1956) did not involve insurance having a waiver of subrogation clause. In my view that opinion's statements respecting "clear and unambiguous" language to be "strictly construed" in order for such an offset or credit to be proper, should not be applied to a waiver of subrogation case where, as contemplated by the parties, the property involved in the transaction is insured by one party under a policy containing such a waiver in favor of the other.

Ordinarily, the only purpose of a waiver of subrogation in such circumstances is to extend a measure of liability protection to the party in whose favor the waiver is made, at essentially no cost to the insured party. This is a reasonable and legitimate use of insur-

ance, and should, without artificial restrictions, normally be given effect where the presence of such insurance is not purely fortuitous and incidental so far as concerns the party in whose favor the subrogation waiver is made. If the agreement between the parties expressly or impliedly requires insurance having a waiver of subrogation, or if for the noninsured party the existence of such insurance is an express or implied condition of the transaction or any of its material terms, this should ordinarily suffice to require that policy proceeds paid the insured party be applied to reduce any liability which the party in whose favor the waiver is made would otherwise have to the insured for covered damage. If the transaction is not so conditioned and the agreement does not *require* insurance having a subrogation waiver, but such is nonetheless procured in connection with the transaction and pursuant to the mutual contemplation of the parties, the same result should obtain if an express or implied agreement or understanding between the parties to that effect is otherwise shown or if there is reasonable detrimental reliance by the party in whose favor the waiver is made.

Here, however, the insurance was purely fortuitous and incidental as to American. The agreement between Brown and American did not require Brown to carry any insurance, nor did it provide that if insurance were carried it would contain a waiver of subrogation clause in favor of American. The insurance was entirely optional with Brown and was in no sense a condition on American's part to the transaction or any of its terms. Although such insurance was in fact purchased by Brown through American (in its capacity as an agent),

there is no testimony whatever by either Brown or American as to any express or implied agreement, understanding or intention in regard to either the waiver or subrogation provision or American's entitlement to credit insurance proceeds paid Brown against liability it might have to him for covered damage. Nor do any of the documents between Brown and American speak to this matter in any way. There is no indication whatever of any detrimental reliance on American's part (it apparently relied on the provision of its contract with Brown limiting its liability to a total of $25).

American points to the bill of lading's provision that "[a]ny carrier or party liable on account of loss or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property." However, there is no evidence that this document was part of the agreement between Brown and American, or that American relied on the quoted provision. The bill of lading was issued by Columbia Export Packers, Inc. (not by American, which described itself as a warehouseman, not a common carrier) and there is no evidence it was received by Brown, or that he was aware of its terms, prior to the delivery of the goods in Alaska. The insurance company paid Brown's claim under a "Loan and Trust Receipt" form purportedly obligating him to repay the insurance company its "loan" to him out of any recovery he might effect from third parties for the damage in question. The form, in its "explanatory note," in essence says that it is designed to circumvent the usual "benefit of insurance" clause in bills of lading. Subsequent to the insurance payment American wrote Brown expressly asserting that the insurance

company had the right to recover from American what it had paid Brown if American were responsible for the damaged condition of the goods.

In my opinion, American's pleadings fairly raised its claim to an offset or credit on account of the insurance proceeds paid Brown. Although the strict standards set out in *Wichita City Lines v. Puckett, supra,* are not properly applicable, American nevertheless failed to tender any evidence sufficient to sustain its entitlement to such relief.

DISSENTING OPINION IN PART

STEAKLEY, Justice.

I agree with the writing and holding of the Court of Civil Appeals that the collateral source rule does not apply. The issuance of the insurance policy and the payment thereunder were admissible to rebut the amount of damages because the insurance was procured pursuant to the contract between the parties. As pointed out by the Court of Civil Appeals, a fourfold recovery of damages results here from the denial of the general principle forbidding more than one recovery for the same loss. 584 S.W.2d 284 at 291-293.

B-1

AMERICAN TRANSFER AND STORAGE COMPANY, Appellant,

v.

Raymond J. BROWN, Appellee.

No. 19598.

Court of Civil Appeals of Texas, Dallas.

April 12, 1979.

Rehearing Denied May 9, 1979.

Customer brought suit under the Deceptive Trade Practices Act to recover for damage to household goods being shipped from Texas to Alaska. The 160th District Court, Dallas County, Dee Brown Walker, J., rendered judgment against the packer, who also acted as agent for the carrier, for treble damages and an attorney fee. Appeal was taken, and the Court of Civil Appeals, Guittard, C. J., held that: (1) the Carmack Amendment to the Interstate Commerce Act did not preempt the Texas Deceptive Trade Practices Act with respect to liability for false, misleading or deceptive acts and practices that occurred before the contract of carriage was made; (2) the section of the Texas Act which provides that any waiver by a consumer of the provisions of the Act is contrary to public policy and is unenforceable and void was effective to nullify any contractual limitation of liability insofar as the suit for damages arising from misrepresentations made before the contract was signed was concerned; (3) the trial court committed

reversible error in excluding evidence of the customer's acceptance of insurance benefits under a policy provided by the contract; (4) damages for mental anguish were not recoverable; and (5) certain special issues submitted by the trial court were improper.

Reversed and remanded.

1. Commerce — 62.12

The Carmack Amendment to the Interstate Commerce Act does not preempt the Texas Deceptive Trade Practices Act with respect to liability for false, misleading or deceptive acts or practices that occurred before the contract of carriage was made. V.T.C.A., Bus. & C. §§ 17.41 et. seq., 17.42-17.50; Interstate Commerce Act, § 20(11), 49 U.S.C.A. § 20(11).

2. States — 4.13

When there is a direct conflict between federal and state law, federal law controls under the supremacy clause. U.S.C.A. Const. art. 6, cl. 2.

3. States — 4.10

State legislation is invalidated by a federal statute which either expressly or impliedly by its structure and purpose evinces an intent to occupy the field and exclude state legislation.

4. States — 4.14

Test for determining whether state legislation is invalidated by federal statute is whether, under the circumstances of the case, the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

5. Commerce — 62.12

Though the Carmack Amendment to the Interstate Commerce Act may be comprehensive in its regulation of contracts of carriage in interstate commerce and claims arising out of such contracts, deceptive trade practices with the possible exception of misrepresentation affecting the applicable rate, do not fall within the ambit of the federal regulation. V.T.C.A., Bus. & C. §§ 17.41 et seq., 17.42-17.50; Interstate Commerce Act § 20(11), 49 U.S.C.A. § 20(11).

6. Commerce — 62.12

Fact that damages for violation of the Deceptive Trade Practices Act in connection with false, misleading or deceptive acts and practices that occurred before a contract of carriage was made may be measured, at least in part, by the same loss as damages for breach of the contract of carriage did not present such an obstacle to full accomplishment of the purpose of the Carmack Amendment to the Interstate Commerce Act as to provide a basis for finding that the state's regulation of the deceptive trade practices relating to interstate shipments had been preempted by federal legislation. V.T.C.A., Bus. & C §§ 17.41 et seq., 17.42-17.50; Interstate Commerce Act, § 20(11), 49 U.S.C.A. § 20(11).

7. Commerce — 62.12

Even assuming that the Carmack Amendment to the Interstate Commerce Act and its provision for limitation of liability applied in any case in which the wrongful conduct alleged would amount to a breach of the contract of carriage, where customer's suit under the

Texas Deceptive Trade Practices Act was not based on any conduct that could be considered a breach of the contract of carriage but was based on false, misleading and deceptive acts and practices of carrier's agent that occurred before contract of carriege was made, for the cause of action so established, the applicable provisions of the Deceptive Trade Practices Act were not preempted by the Carmack Amendment. V.T.C.A., Bus. & C. §§ 17.41 et seq., 17.42-17.50; Interstate Commerce Act, § 20(11), 49 U.S.C.A. § 20(11).

8. Consumer Protection — 39

In suit under the Deceptive Trade Practices Act to recover for damage to household goods being shipped from Texas to Alaska, evidence concerning representations made by defendant, a packer which served as an agent for interstate carriers, established that the customer was misled with respect to the packer's actual method of operation and warranted jury in finding that the representations constituted deceptive trade practices which caused substantial economic loss and inconvenience to customer. V.T.C.A., Bus. & C. § 17.41 et seq.

9. Consumer Protection — 40

In view of the section of the Deceptive Trade Practices Act which provides that any waiver by a consumer of the provisions of the Act is contrary to public policy and is unenforceable and void, purported limitation of liability found in order for services that were signed by customer and also in bill of lading, though possibly effective to limit liability under the contract, could not be relied on as an absolute limit on damages recoverable

under the Deceptive Trade Practices Act for misrepresentations made before contract of carriage was signed. V.T.C.A., Bus. & C. § 17.42.

10. Damages — 182

In suit under the Deceptive Trade Practices Act to recover for damage to household goods being shipped from Texas to Alaska, issuance of insurance policy to cover the shipment and evidence of payment under the policy were admissible to rebut the amount of damages claimed where the insurance was procured pursuant to the contract between the parties. V.T.C.A., Bus. & C. §17.41 et seq.

11. Damages — 64

The theory behind the collateral source rule is that a wrongdoer should not have the benefit of insurance independently procured by the injured party and to which the wrongdoer was not privy.

12. Damages — 59

The collateral source rule is an exception to the general principle forbidding more than one recovery for the same loss.

13. Consumer Protection — 40

The principle which forbids more than one recovery for the same loss applies to actions brought under the Deceptive Trade Practices Act. V.T.C.A., Bus. & C. §§ 17.41 et seq., 17.42-17.50.

14. Evidence — 219(3)

Where claim was not contested and insurance company paid the amount claimed in full, evidence of

plaintiff's acceptance of an insurance payment, offered on theory that plaintiff's claim and acceptance of a smaller amount than that asserted as damages was an admission that the amount of damages was not as great as that claimed in suit, was not properly excluded on the ground that the evidence was evidence of a compromise of a doubtful claim.

15. Appeal and Error — 837(12)

The Court of Civil Appeals cannot render judgment on the basis of the evidence that was excluded by the trial court and that appeared in the record only in appellee's bill of exception.

16. Consumer Protection — 36

In suit under the Deceptive Trade Practices Act based on customer's allegation that he was induced to enter into a contract of transportation by false, misleading and deceptive representations of defendant's agent, it was improper for the court to submit issues to the jury which, rather than making a factual inquiry as to whether the alleged representations were made, in effect asked legal question whether defendant violated the relevant subdivisions of the Act. V.T.C.A., Bus. & C. § 17.46(a, b), (b)(5, 7).

17. Trial — 136(1)

It is the function of the court, not of the jury, to apply the law to the facts.

18. Trial — 213

It is improper to submit a legal question to the jury without appropriate instructions.

19. Consumer Protection — 36

In suit under the Deceptive Trade Practice Act, the better procedure is for the trial court to submit to the jury issues concerning the particular act or practice alleged to have been false, misleading or deceptive. V.T.C.A., Bus. & C. §§ 17.41 et seq., 17.42-17.50.

20. Damages — 105

The proper measure of damages applicable to loss of household goods and personal effects is not their market value as second hand goods at the time and place of loss but, rather, their actual value to the owner in the condition in which they were at the time, excluding any fanciful or sentimental consideration.

21. Appeal and Error — 1062.1

In suit to recover for damage to or loss of household goods and personal effects, if the value of the goods to the owner is proved and there is no evidence that they have a value to him at one place different from the value they possessed at another, failure of a special issue to limit the value to a particular time and place is not reversible error.

22. Damages — 221(5)

In action to recover for damage to or loss of household goods and personal effects, the better practice is to submit to the jury an issue containing by its terms the proper measure of damages rather than to submit an issue inquiring generally the amount of compensation that would be reasonable, even if such a general issue is accompanied by an appropriate instruction.

23. Consumer Protection — 40

Damages for mental anguish are not recoverable under the Deceptive Trade Practices Act. V.T.C.A., Bus. & C. §§ 17.44, 17.50, 17.50(a, b).

24. Consumer Protection — 40

Though the Deceptive Trade Practices Act greatly enlarges the grounds on which damages are recoverable and provides for trebling of actual damages, the Act does not extend the scope of "actual damages" beyond that recognized by settled rules of common law. V.T.C.A., Bus. & C. §§ 17.44, 17.50, 17.50(a, b).

See publication Words and Phrases for other judicial constructions and definitions.

25. Damages — 49

The demands on the judicial system for reparation of substantial monetary losses are so great that only in exceptional circumstances should courts be required to take account of emotional distress unaccompanied by physical injury.

26. Courts — 92

Although the duty of Court of Civil Appeals is to apply the law as decided and declared by the Supreme Court, the Court of Civil Appeals is not bound by assumptions and implications of Supreme Court opinions; justice in the particular case as well as rational and orderly development of the law demands that the doctrine of stare decisis be limited to questions raised and decided on full consideration.

Duncan E. Boeckman, Golden, Potts, Boeckman & Wilson, Dallas, for appellant.

Carl David Adams, Dallas, for appellee.

Before GUITTARD, C. J., and AKIN and ROBERTSON, JJ.

GUITTARD, Chief Justice.

This suit was brought under the Texas Deceptive Trade Practices Act, Tex.Bus. & Comm.Code §§ 17.42-17.50 (Vernon Supp. 1979) for damages to household goods being shipped from Irving, Texas, to Fairbanks, Alaska. The trial court rendered judgment against the packer, who also acted as agent of the carriers, for treble damages and an attorney's fee. The principal question is whether the Texas Act is pre-empted by the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 20(11), (1970), which concerns liability for goods shipped in interstate commerce.

[1] We hold that the Carmack Amendment does not pre-empt the Texas Act with respect to liability for false, misleading, or deceptive acts and practices that occurred before the contract of carriage was made. For like reasons, we hold that a contractual limitation of liability does not apply. However, we conclude that the cause must be reversed and remanded for a new trial because the trial court erred in excluding evidence of the shipper's acceptance of insurance benefits under coverage provided by the contract. We also hold that damages for mental anguish cannot be recovered for this kind of loss, and we give directions concerning special issues to be submitted on another trial.

1. Pre-emption of Deceptive Trade Practices Act by the Carmack Amendment

Defendant does not challenge the sufficiency of the evidence to support the jury's findings of deceptive trade practices. Consequently, we must assume that plaintiff has established his cause of action for deceptive trade practices unless the Texas Deceptive Practices Act is inapplicable because of the interstate character of the shipment involved. Defendant's principal contention is that the Act does not apply because this suit is an action for damages to freight shipped in interstate commerce within the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 20(11) (1970), which regulates such claims and excludes all recovery based on state statutes or common-law grounds.

Plaintiff asserts that his claim is not based on the contract of carriage or on any rule of carrier liability, under either statute or common law, but that it rests solely on the Texas Deceptive Trade Practices Act. He argues that the interstate character of the shipment does not exempt defendant from the penalties of the Texas law for false, misleading, and deceptive acts and practices.

This question has given us difficulty because the opinions of the Supreme Court of the United States on the question of federal pre-emption of state law, though numerous, provide no clear guidance. Each case turns on the peculiarities and special features of the regulatory scheme in question. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 637, 638, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973).

[2-4] Of course, if there is a direct conflict between federal and state law, the federal law controls under the Supremacy Clause in Article VI of the United States Constitution. *Perez v. Campbell*, 402 U.S. 637, 91 S.Ct.

1704, 29 L.Ed.2d 233 (1971); *Swift and Co. v. Wickham*, 382 U.S. 111, 86 S.Ct. 258, 15 L.Ed.2d 194 (1965); *Gibbons v. Ogden*, 9 Wheat. 1, 22 U.S. 1, 6 L.Ed. 23 (1824); *see, e. g.*, Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 Colum.L.Rev. 623 (1975). Likewise, state legislation is invalidated by a federal statute that either expressly or impliedly by its structure and purpose evinces an intention to occupy the field and exclude state regulation. *Jones v. Rath Packing Company*, 430 U.S. 519, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977). The test is whether under the circumstances of the particular case the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Perez v. Campbell*, 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971); *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1940).

Accordingly, we must examine the Carmack Amendment and the decisions construing it to determine the purposes and objectives of Congress. The subject matter of the amendment is contracts for interstate transportation of property and the liability of carriers for breach of such contracts. The statute contains detailed provisions concerning the liability of initial and connecting carriers for losses in interstate shipments, issuance of bills of lading, contractual limitations of liability, and notice and filing of claims. This statute was construed authoritatively in the leading case of *Adams Express Co. v. Croninger*, 226 U.S. 491, 33 S.Ct. 148, 57 L.Ed. 314 (1912), which held that the provision of this law permitting a carrier to fix its rates with respect to the agreed or declared value of the property

renders inapplicable any local law forbidding limitation of liability to less than the full value. The Supreme Court pointed out that the purpose of the Carmack Amendment was to free interstate shipments from the diversity of legislative and judicial holdings that made it difficult for shippers and carriers to know the extent of the carrier's responsibility for goods delivered to it for transportation from one state to another. The court stated:

> That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue, and limits his power to exempt himself by rule, regulation, or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject, and supersede all state regulation with reference to it. [226 U.S. at 505-506, 33 S.Ct. at 152].

Following *Croninger*, the Supreme Court held in *Atchison, T. & S. F. Ry. v. Harold*, 241 U.S. 371, 36 S.Ct. 665, 60 L.Ed. 1050 (1916), that the Carmack Amendment applies to liability for an error in a bill of lading even though Congress has not legislated specifically on that subject. The court said that the amendment "was an assertion of the power of Congress over the subject of interstate shipments, the duty to issue bills of lading, and the responsibilities thereunder, which, in the nature of same, excluded state action." The court reaffirmed its position that the "prime object" of the amendment "was to bring about a uniform

rule of responsibility as to interstate commerce and interstate commerce bills of lading." This principle of uniformity of responsibility for shipments in interstate commerce has been held to exclude recovery of the attorneys' fees provided by state law in an action for damages to an interstate shipment. *Strickland Transport Co. v. American Distrib. Co.*, 198 F.2d 546, 547 (5th Cir. 1952); *Southwestern Motor Transport Co. v. Valley Weathermakers, Inc.*, 427 S.W.2d 597 (Tex. 1968).

[5] Comprehensive though the Carmack Amendment may be in its regulation of contracts of carriage in interstate commerce and claims arising out of such contracts, we conclude that deceptive trade practices, except possibly to the limited extent of misrepresentations affecting the applicable rate,[1] do not fall within the ambit of federal regulation. The uniformity sought by the Carmack Amendment, according to the authorities above mentioned, is uniformity in the requirements of a contract of carriage in interstate commerce and in the carrier's liability for breach of its duties under such a contract. The Deceptive Trade Practices Act does not purport to regulate these matters and presents no obstacle to full accomplishment of uniformity in these respects. It applies to false, misleading, and deceptive acts or practices in general and makes no special provision for interstate shipments or other transactions in interstate commerce. We find nothing in the Carmack Amendment or in the decisions construing it suggesting that uniformity was sought with respect to legal lia-

1. Another federal statute forbids misstatement of weight or classification of freight for the purpose of obtaining or allowing transportation at less than the regular rate. 49 U.S.C. § 10 (1970).

bility for false, deceptive, or misleading acts or practices preliminary to the formation of the contract for interstate shipment. We conclude that protection of interstate shippers from such practices is left to the police powers of the several states.

[6] We recognize that in this case damages for violation of the Deceptive Trade Practices Act may be measured by the same loss, at least in part, as damages for breach of the contract of carriage. This coincidence should not obscure the differences in the purposes of the two statutes, in the scope of activities they undertake to regulate, or in their respective grounds of liability. In these important respects, the two neither conflict nor overlap. Measurement of damages by the same loss does not present an obstacle to full accomplishment of the purpose of the federal legislation. For this purpose the treble damage penalty imposed by the Deceptive Trade Practices Act is no different from a fine or civil penalty determined on some other basis. Consequently, we find no basis to hold that the state's regulation of deceptive trade practices relating to interstate shipments has been pre-empted by federal legislation.

Although this exact problem was not considered in any of the cases cited to us, our holding is consistent with the decisions of the Supreme Court of the United States concerning federal pre-emption. The most nearly analogous case we have found is *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960). There an ordinance regulating emission of smoke from boilers was held applicable to boilers of ships engaged in interstate commerce while within the city's boundaries, even though such ships

and their boilers had been licensed under federal law, inspected by federal authority, and certified by federal officials as safe for navigation. The Supreme Court held that there was no overlap between the federal inspection law, which was concerned with protection against the perils of maritime navigation, and the city ordinance, which aimed to eliminate air pollution for protection of the health and welfare of the local community. *Id.* at 445, 80 S.Ct. 813. The court pointed out that state regulation based on the police power, which does not discriminate against interstate commerce or operate to disturb its required uniformity, was not an undue burden on interstate commerce. That decision may be compared with *Douglas v. Seacoast Products, Inc.* 431 U.S. 255, 97 S.Ct. 1740, 52 L.Ed.2d 304 (1977), which held that federal regulations licensing fishing vessels pre-empted a state licensing law imposing more restrictive requirements on vessels owned by nonresidents than on those owned by local citizens, but in that case the court observed that reasonable and even-handed conservation measures stood unaffected by the decision.

Also, in *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 93 S.Ct. 1590, 36 L.Ed.2d 280 (1973), a Florida statute imposing strict liability for damages incurred by the state or by private persons as a result of discharge of oil and other chemicals into its territorial waters was held not pre-empted by a federal statute authorizing federal regulations requiring maintenance of equipment to prevent oil spills by ships and terminal facilities and imposing on their owners liability without fault for clean-up costs incurred by the federal government as a result of such spills. Similarly, in *Dick-*

son v. Uhlmann Grain Co., 288 U.S. 188, 53 S.Ct. 362, 77 L.Ed. 691 (1933), the court held that the Federal Grain Futures Act, which imposed certain requirements for sales of grain for future delivery, did not supercede a Missouri statute prohibiting gambling on grain futures. Other decisions standing for the same principle are cited in the margin.[2]

Defendant argues that if the Deceptive Trade Practices Act is applicable, all the plaintiff would have to do to avoid the federal law would be to prove a representation that the goods would not be damaged in shipment. Consequently, defendant insists, the limitation of liability provided by the Carmack Amendment would be nullified if the penalties of the Deceptive Trade Practices Act were permitted to apply.

[7] We do not agree. We may concede for present purposes that the Carmack Amendment and its provi-

2. *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 136-37, 94 S.Ct. 383, 38 L.Ed.2d 348 (1973) (federal act regulating stock exchanges did not preempt state legislation concerning rights of brokers' employees); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 145, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963) (federal regulation establishing minimum standards for marketing of avocados did not displace California regulations concerning oil content of the same products); *Colorado Anti-Discrimination Comm'n v. Continental Air Lines*, 372 U.S. 714, 721-22, 83 S.Ct. 1022, 10 L.Ed.2d 84 (1963 (federal anti-discrimination laws did not displace Colorado statute forbiding racial discrimination in hiring airline employees); *California v. Zook*, 336 U.S. 725, 732, 69 S.Ct. 841, 93 L.Ed. 1005 (1949) (federal regulation of travel bureaus did not preempt consistent state regulation of same subject); *Rice v. Board of Trade*, 331, U.S. 247, 253, 67 S.Ct. 1160, 91 L.Ed. 1468 (1947) (Federal Commodity Exchange Act did not pre-empt consistent state regulation of commodity exchanges); and *see generally*, Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 Collum.L.Rev. 623 (1975).

sion for limitation of liability applies to any case in which the wrongful conduct alleged would amount to a breach of the contract of carriage, whether the suit is brought in the form of an action on the contract or on some statutory or common-law ground. Nevertheless, in this case, plaintiff's action is not based on any conduct that could be considered a breach of the contract of carriage. It is based on false, misleading and deceptive acts and practices of defendant's agent that occurred before the parties entered into the contract. Plaintiff Raymond Brown alleged that he engaged the services of defendant American Transfer & Storage Company to move his household belongings and Chevrolet automobile to Fairbanks, Alaska; that plaintiff was induced to enter into its contract by the false, misleading and deceptive representation of defendant's agents that defendant would provide a "door to door" service, including careful packing, storage, movement, delivery, and placement in defendant's residence, and that certain types of containers and vaults would be used to assure safe delivery; and that as a result of such representations plaintiff was damaged in the amount of $23,200 for loss or damage to his household goods, $1,050 for repairs to his automobile, and $5,000 in mental anguish.

[8] These allegations were amply supported by the evidence. Defendant was not itself an interstate carrier, but it served as an agent for interstate carriers and as a packer of goods for interstate shipment. In response to a telephone call from plaintiff, defendant's agent, Joe Stanton, came to plaintiff's home in Irving, surveyed its contents, and described the services that defendant offered. Stanton represented that the goods

would be packed securely in wooden vaults or crates before plaintiff's eyes in Irving, Texas, that the containers would not be opened or tampered with until delivered to plaintiff's new home in Fairbanks, Alaska, that when they arrived there they would be unpacked and placed in the house at plaintiff's direction, and that the automobile would be shipped separately. Relying on these representations, plaintiff entrusted his goods to defendant for shipment. The evidence shows that these representations misled plaintiff with respect to defendant's actual method of operation. Defendant's employees took the goods and packed them, as represented, but then, without plaintiff's knowledge, removed the goods from the wooden containers and stacked the furniture and the cardboard boxes containing plaintiff's other possessions in a single Sealand container, together with the automobile. This method, according to plaintiff's witness, was inadequate for overseas shipment. When received in Fairbanks most of the goods were missing or damaged and the automobile needed repair. Moreover, the evidence shows that the practice of the terminal carrier, which delivered the goods in Fairbanks, was not to unpack the goods and place them as directed, but merely to set the furniture and cardboard containers in the house. Defendant did not deny these facts, but undertook to defend its practices as acceptable methods of transportation. In the light of this evidence, the jury was justifled in finding that Stanton's representations constituted deceptive trade practices and that plaintiff was adversely affected in that the inadequate packing of the goods caused a substantial portion of them to be lost, destroyed and damaged, that plaintiff and his wife were put to additional trouble in unpacking and arranging those that remained, and that

they were without an automobile while theirs was being repaired. We hold that for the cause of action so established the applicable provisions of the Deceptive Trade Practices Act have not been pre-empted by the Carmack Amendment.

2. Limitation of Liability

[9] Apart from the pre-emption question, defendant asserts that the court erred in not limiting plaintiff's damages to thirty cents per pound of the weight of the goods shipped, as specified in the order for services signed by plaintiff and also in the bill of lading. It also complains that the court erroneously excluded those portions of the order and of the bill of lading which contain such limitations of liability. Plaintiff responds that the limitation of liability was properly excluded because it was void and unenforceable under section 17.42 of the Texas Deceptive Trade Practices Act, which provides that any waiver by a consumer of the provisions of the Act "is contrary to public policy and is unenforceable and void."

We conclude that plaintiff's contention in this respect is well taken insofar as the contractual limitation of liability is relied on as an absolute limitation of the damages. The limitation may be effective to limit liability under the contract, but, as already pointed out, this suit is not brought on the contract. It is rather an action under the Deceptive Trade Practices Act for damages from misrepresentation made before the contract was signed. Since we have already held that application of the Deceptive Trade Practices Act has not been preempted by the Carmack Amendment, we hold also that section 17.42 is effective to nullify any con-

tractual limitation of liability insofar as this action is concerned. Nevertheless, we conclude that the court erred in excluding the contractual limitation insofar as it bears on the question of admissibility of the matter of insurance payments, to which we now turn our attention.

3. Insurance Coverage and Payment

[10] Alternatively, defendant asserts that even if the Deceptive Trade Practices Act applies, the court erred in excluding from evidence the insurance certificate obtained by defendant to cover plaintiff's shipment and in excluding evidence of the $11,009.22 payment received by plaintiff in settlement of his claim under that certificate. Defendant alleged in its answer that as a part of its agreement with plaintiff, defendant, as agent for the insurance company, issued a certificate of insurance covering loss or damage to plaintiff's goods, that plaintiff had made a claim under this certificate and had received a payment of $10,000 for loss and damage to his household goods and personal effects and $1,009.22 for damages to his automobile. Evidence supporting these allegations was excluded by the court in response to plaintiff's motion in limine, and defendant tendered the evidence in a bill of exception. The jury found that the damage to plaintiff's household goods and furniture was $18,434 and that the cost of repair of his automobile was $1,059.22. The jury also found damage from mental anguish in the amount of $5,000. The trial court rendered judgment for three times the sum of these amounts, plus an attorney's fee.

Plaintiff seeks to support the trial court's exclusion of the insurance coverage and settlement by invoking

the collateral source rule and arguing that the insurance payment is immaterial because defendant is not entitled to the benefit of any insurance coverage procured for plaintiff.

We conclude that the collateral source rule does not apply and that the issuance of the insurance policy and the payment under it were admissible to rebut the amount of damages claimed by plaintiff because the insurance was procured pursuant to the contract between the parties.

[11, 12] The theory behind the collateral source rule is that a wrongdoer should not have the benefit of insurance procured by the injured party, and to which the wrongdoer was not privy. *Texas & P. Ry v. Levi*, 59 Tex. 674, 676 (1883); *Graves v. Poe*, 118 S.W.2d 969 (Tex.Civ.App — El Paso 1938, writ dism'd); *Perrott v. Shearer*, 17 Mich. 48, 56 (1868). The rule is an exception to the general principle forbidding more than one recovery for the same loss. *See* Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 Minn.L.Rev. 669 (1962). That principle was firmly established by the Supreme Court of Texas in *Bradshaw v. Baylor University*, 126 Tex. 99, 84 S.W.2d 703 (1985) and was reaffirmed in *T. L. James & Co. v. Statham*, 558 S.W.2d 865, 868 (Tex.1977).

The general principle, rather than the collateral source rule, was applied by the supreme court in *Publix Theatres Corp. v. Powell*, 123 Tex. 304, 71 S.W.2d 237, 241 (1934). There a lease of a theater required the lessee to keep the premises insured. A fire occurred as a result of the negligence of a corporation affiliated with the lessee. The lessor collected the insurance proceeds and then sued the negligent party for the loss. The su-

preme court held that by providing the insurance, the lessee had satisfied the claim of the damaged party. The court distinguished cases applying the collateral source rule on the ground that in those cases the payment by the insurance company was the result of a contract to which the wrongdoer was not privy.

Here, likewise, the record shows that the insurance coverage in question was not procured independently by plaintiff, but was procured by defendant pursuant to the contract between the parties. The order for moving services signed by plaintiff provides as follows:

> IN THE ABSENCE OF ANOTHER SEPARATE WRITTEN AGREEMENT AND IN CONSIDERATION OF THE RATES TO BE CHARGED FOR THE SERVICES TO BE PERFORMED, I AGREE THAT THE LIABILITY OF AMERICAN TRANSFER AND STORAGE CO. IS LIMITED TO THIRTY CENTS (.30¢) PER POUND PER ARTICLE AND TO TWENTY-FIVE DOLLARS TOTAL CLAIM. I WILL ARRANGE ADDITIONAL INSURANCE IF DESIRED.

This same order provides for insurance on the goods in the amount of $26,100 at a premium of $522. The bill of lading and freight bill, also signed by plaintiff, and issued by defendant as agent for Columbia Export Packers, Inc., provides:

> 2. This carrier's liability for loss or damage is limited to a maximum of 30¢ per pound of the weight of each shipping package or unpacked article. Additional insurance is available to the shipper in the event he desires it.

3. Shipper declares that the entire shipment is valued at $ and hereby agrees to the foregoing contract, conditions and terms.

In accordance with these contracts, plaintiff paid to defendant the premium of $522 and defendant's agent Stanton signed and delivered to plaintiff a "Transit-Pak Certiffcate" evidencing insurance underwritten by the Insurance Company of North America covering the full value of plaintiff's property in the amount of $26,100. This certificate provides:

> The Company shall be subrogated to the extent of their payment for losses insured hereunder to all the Insured's rights of recovery against any person or organization, excepting the origin and destination freight forwarders and packers and their designated agents, who perform pick-up, packing delivery and unpacking services in connection with the movement of the shipment.

The substance of this transaction was that the insurance was obtained for the benefit of both parties. It is unlikely that plaintiff would have agreed to such a low valuation for his goods if their full value had not been insured against loss or damage in transit. It is also unlikely that defendant would have undertaken to pack and forward the goods at the rate specified if they had not been fully insured. As noted in our discussion of the pre-emption question, the rule is well established that a carrier may base its rates on an agreed valuation and may charge a higher rate based on a higher valuation. *Adams Express Co. v. Croninger*, 226 U.S. 491, 33 S.Ct. 148, 57 L.Ed. 314 (1912). The nominal valuation specified in the order for moving services and the parties'

failure to fill in the valuation amount on the bill of lading can be understood only on the assumption that both parties contemplated that plaintiff would look to the insurance company rather than defendant or Columbia Packers to make good any additional loss. The exclusion of subrogation rights against defendant and Columbia Packers is another indication that the insurance was procured for the benefit of those parties as well as plaintiff. In effect, plaintiff paid the insurance company, rather than the defendant, to assume the risk of loss or damage in transit in excess of the nominal valuation declared in the contract. This situation is not within the rationale of the collateral source rule.

[13] We see no reason why the principle forbidding more than one recovery for the same loss should not apply to an action brought under the Deceptive Trade Practices Act as well as to any other. Notwithstanding our holding that plaintiff's cause of action is separate and distinct from an action on the contract and that the contractual limitation of liability has no application, the fact remains that the actual loss complained of in this action is the same loss for which the parties have, by their contract, provided insurance. In accordance with the contract, plaintiff has already been compensated for that loss to the extent of $11,009.22 by the insurance company, which is not entitled to subrogation. To deny application of the general principle here would permit plaintiff to collect the full amount of his loss from the insurance company and then have judgment for three times the same damages from defendant, thus recovering his damages fourfold. Consequently, we hold that the trial court erred in excluding from evidence the provisions of the contract concerning

insurance, the insurance certificate, and the insurance payment received. Evidence of the premium paid by plaintiff was also admissible.

This holding does not ignore the no-waiver provision in section 17.42 of the Act. We give effect to that provision by permitting recovery of three times plaintiff's actual loss in excess of the insurance payment, notwithstanding the contractual limitation to a small or nominal amount. The contractual limitation is relevant only to show that the insurance coverage was an integral part of the entire contract between the parties and, consequently, not within the collateral source rule.

[14] We note that defendant offered evidence of plaintiff's acceptance of the insurance payment on the additional ground that his claim and acceptance of a smaller amount than that asserted as damages in the present case was an admission that the amount of damages to his goods was not as great as that now claimed. Although defendant has not briefed this point on appeal, there is authority supporting this theory of admissibility. *Moore v. Dallas Ry. & T. Co.*, 238 S.W.2d 741 (Tex.Civ.App. — Amarillo 1951, writ dism'd). In this connection plaintiff argues that evidence of the insurance payment was properly excluded as a compromise of a doubtful claim, citing *Allen v. Avery*, 537 S.W.2d 789 (Tex.Civ.App. — Texarkana 1976, writ ref'd n. r. e.). The bill of exception shows, however, that the claim was not contested and that the insurance company paid the amount claimed in full. Consequently, evidence of the payment was not properly excluded on that ground. Moreover, the principle forbidding more than one recovery for the same loss applies even though the earlier payment was the result of a com-

promise. *See Bradshaw v. Baylor University*, 126 Tex. 99, 84 S.W.2d 703 (1935).

[15] Defendant suggests that we should reform the judgment by reducing it to the proper amount. We cannot, however, render judgment on the basis of evidence that was excluded by the trial court and appears in the record only in defendant's bill of exceptions. Consequently, we must remand the case for a proper determination of the damages. *First Nat'l Bank v. Fite*, 131 Tex. 523, 115 S.W.2d 1105, 1110 (1938); *Nast v. San Antonio, U. & G. Ry.*, 261 S.W. 1011, 1013 (Tex.Com.App.1924, holding approved); *Baldwin v. Willis*, 253 S.W.2d 287, 294 (Tex.Civ.App. — Beaumont 1952, writ ref'd n.r.e.). Since the damages are unliquidated and the liability issues are contested, we must remand the case for an entire new trial. Tex.R.Civ.P. 434. Accordingly, we turn to other points in appellant's brief and consider questions that probably will arise again in the trial court.

4. Form of Liability Issues

Defendant complains of the form of the issues submitted concerning the alleged deceptive trade practices. It asserts that the jury's answers to these issues will not support a judgment because they are too broad, are not ultimate fact issues, and do not submit the disputed issues of fact because the jury could have answered them affirmatively from the undisputed evidence.

Plaintiff contends that defendant failed to preserve the points by proper objections in the trial court, but we need not consider the sufficiency of the objections,

since the case must be reversed on grounds already stated. We consider these points only as they bear on the issues to be submitted on another trial.

The issues complained of and the jury's answers to them are as follows:

SPECIAL ISSUE NO. 1

DO YOU FIND from a preponderance of the evidence that defendant, American Transfer & Storage Company, represented to Plaintiff, Raymond Brown, that the moving services of American Transfer & Storage Company would include benefits and characteristics which they did not include?

ANSWER: We do.

SPECIAL ISSUE NO. 2

DO YOU FIND from a preponderance of the evidence that the representation or representations inquired about in Special Issue No. 1 was a producing cause of any damage to Raymond Brown?

ANSWER: We do.

SPECIAL ISSUE NO. 5

DO YOU FIND from a preponderance of the evidence that Defendant, American Transfer & Storage Company, represented to Plaintiff, Raymond Brown, that the moving services of American Transfer & Storage Company were of a particular standard, quality or grade, when in fact they were not?

ANSWER: We do.

SPECIAL ISSUE NO. 6

DO YOU FIND from a preponderance of the evidence that the representation or representations inquired about in Special Issue No. 5 was a producing cause of any damage to Raymond Brown?

ANSWER: We do.

[16] We agree that these issues are improper. As defendant points out, it is impossible to determine from the jury's answers which of the deceptive trade practices alleged occurred or which caused the damages found by the jury. Plaintiff alleged that he was induced to enter into the contract of transportation by the representation of defendant's agent Stanton that the contract for moving would be a "door-to-door" service, including careful packing, storage, movement, delivery, unpacking, and placement in plaintiff's home in Fairbanks of all his furniture and personal belongings. Plaintiff also alleged that Stanton represented that there would be no hidden or unnecessary charges, that certain types of containers and vaults would be used to assure safe delivery, and that defendant was to be the principal mover in contracting and completing the move. Plaintiff further alleged that these representations as to characteristics, ingredients, benefits, or quality of services to be rendered by defendant were false, misleading, and deceptive to plaintiff and damaged plaintiff in the amount of $23,200 as actual damages to his household goods, $1,050 to his automobile, $700 for loss of use of his automobile, and $5,000 for mental anguish.

Defendant points out that these issues do not establish that the deceptive trade practices found by the

jury actually caused the loss of his goods. He points out that that it was undisputed that plaintiff's goods were not unpacked and placed in their home in Fairbanks, as Stanton represented they would be, and that if the jury had found that this was the only false, misleading, and deceptive representation made by Stanton, the jury would still have had to answer the issues as it did, namely, that defendant represented that its moving services would include benefits and characteristics which they did not include and were of a particular standard, quality or grade when in fact they were not, and that both of these misrepresentations were a producting cause of "damage to Raymond Brown."

Defendant further contends that the proper method of submitting the issues is that prescribed by the supreme court in *Spradling v. Williams*, 566 S.W.2d 561, 564 (Tex. 1978). As we read that opinion, it holds that in a deceptive trade practice case it is necessary to submit an issue inquiring whether the particular act or practice alleged occurred. *Spradling* further states that if the act or practice so submitted falls within any of the twenty subdivisions of section 17.46(b), then an affirmative finding establishes the deceptive trade practice, but that if the act or practice so submitted does not fall wthin any of these subdivisions, another issue must be submitted inquiring whether the particular act or practice alleged is a deceptive trade practice, so as to bring it within subdivision (a) of section 17.46.

[17, 18] No such submission was made in the present case, since none of the acts or practices alleged in the petition were submitted to the jury. The jury was simply asked in the first issue whether defendant rep-

resented to plaintiff that defendant's services "would include benefits and characteristics which they did not include," without confining the jury's consideration to any particular representations. Likewise, the fifth issue inquired whether defendant represented to plaintiff that its services "were of a particular standard or grade when in fact they were not." Thus, the court, in effect, asked legal questions as to whether defendant violated subdivisions (5) and (7) of section 17.46(b) rather than making the factual inquiry of whether the alleged representations were made. It is the function of the court, rather than the jury, to apply the law to the facts and determine whether the representation found falls within any of the subdivisions of section 17.46(b). It is still improper, as it always has been, to submit to the jury a legal question without appropriate instructions. *Knitson v. Ripson*, 163 Tex. 312, 354 S.W.2d 575, 576 (1962); *Kunkel v. Poe Land & Development Co.*, 393 S.W.2d 191, 194 (Tex. Civ.App.—Corpus Christi 1965, no writ); *Foerster v. Louis Peoples*, 362 S.W.2d 918 (Tex.Civ.App. — Amarillo 1962, no writ).

[19] Conceivably, the court could have phrased the issues as it did if it had also given appropriate accompanying instructions with respect to the representations raised by the pleadings and the evidence. *See Scott v. Atchison, T. & S.F. Ry.*, 572 S.W.2d 273, 278 (Tex.1978); *Scott v. Ingle Bros. Pacific, Inc.*, 489 S.W.2d 554, 557 (Tex. 1972). No such instructions were given, however, and, in any case, the better practice is to follow the procedure approved in *Spradling*, that is, to submit to the jury issues concerning the particular act or practice alleged to have been false,

misleading, or deceptive. We direct that this method of submission be used on another trial and also that the issues be so phrased as to limit the jury's consideration of damages to those resulting from the acts or practices found to have been false, misleading, or deceptive. *Woods v. Littleton*, 554 S.W.2d 662, 671-72 (Tex. 1977.

5. Property Damage

Defendant's principal complaint concerning the damage issue is that it did not inquire as to the damages to plaintiff's household goods and furniture at the time and place of the loss. The issue inquires the amount of money that "would reasonably compensate Raymond Brown for the damages, if any, to his household goods and furniture." An instruction accompanying this issue states that the measure of damages is "the cost to replace such household goods or furniture."

[20, 21] This point is not well taken in view of the special measure of damages applicable to loss of household goods and personal effects. The proper measure is not their market value as second-hand goods at the time and place of the loss, but their actual value to the owner in the condition in which they were at the time, excluding any fanciful or sentimental consideration. *Crisp v. National Ins. Co.*, 369 S.W.2d 326, 328 (Tex.1965); *American Transfer & Storage Co. v. Reichley*, 560 S.W.2d 196, 198 (Tex.Civ.App. — Amarillo 1978, writ ref'd n. r. e.). If the value of the goods to the owner is proved, and there is no evidence that to him they have a value at one place different from what they possessed at another, failure of the issue to limit the value to a particular time and place is

not reversible error. *International & G. N. Ry. v. Nicholson*, 61 Tex. 550, 553 (1884).

[22] The better practice, in our opinion, is to submit an issue containing by its terms the proper measure of damages rather than to submit an issue inquiring generally the amount of compensation that would be reasonable, even if such a general issue is accompanied by an appropriate instruction. Consequently, we direct that on another trial the court submit an issue, in accordance with the *Crisp* opinion, inquiring the reduction in value to plaintiff of his household goods and furniture suffered by plaintiff as a result of his reliance on the deceptive trade practices, if any, found in answer to any of the preceding issues, excluding any fanciful or sentimental value.

In view of our remand for a new trial on other issues, we need not consider whether the evidence is sufficient to support the finding of damages.

6. Mental Anguish

Finally, defendant complains of the submission of an issue on mental anguish on the ground that there is no legal basis to support such a recovery. Defendant relies on cases holding that damages for mental anguish are recoverable only when the mental anguish is suffered in connection with actual physical harm or where defendant has committed a direct and intentional invasion of plaintiff's interest in personal security and peace of mind. *Duty v. General Finance Co.*, 154 Tex. 16, 273 S.W.2d 64, 65 (1954); *Harned v. E-Z Finance Co.*, 151 Tex. 641, 254 S.W.2d 81, 82 (1953); *Phillips v. Latham*, 523 S.W.2d 19, 27 (Tex.Civ.App. — Dallas 1975, writ ref'd n. r. e.).

Plaintiff does not challenge the principles stated in these cases, but insists that they are not applicable to actions brought under the Deceptive Trade Practices Act. He points out that section 17.44 requires that the Act be "liberally construed and applied to promote its underlying purpose, which is to protect consumer against false, misleading and deceptive busness practices, unreasonable acts and breaches of warranty and to provide efficient and economical procedures to secure such protection," and that section 17.50 gives a cause of action to a consumer "if he has been adversely affected" by such acts or practices. Consequently, plaintiff argues, the Act has the effect of creating a cause of action for mental anguish, regardless of whether the wrong complained of was a willful wrong or accompanied by other physical harm. He cites Maxwell, *Public and Private Rights and Remedies under the Deceptive Trade Practices-Consumer Proctection Act*, 8 St. Mary's Law J. 617 (1977), and relies on *Woods v. Littleton*, 554 S.W.2d 662 (Tex. 1977).

[23] This question was recently decided adversely to plaintiff's contention in *Dennis Weaver Chevrolet, Inc., v. Chadwick*, 575 S.W.2d 619 (Tex.Civ.App.—Beaumont, 1978, writ ref'd n.r.e.). In a scholarly opinion, Justice Keith points out that the Deceptive Trade Practices Act has not adopted the new tort of mental anguish, but, on the contrary, has left the damages recoverable under section 17.50 to be determined according to common-law rules. We agree with Justice Keith. The Act makes no mention of mental anguish. Section 17.50(a) provides that a consumer "may maintain an action if he has been adversely affected," and section

17.50(b) provides that in such a suit he may obtain "three times the actual damages." There is no definition of "actual damages," and no indication that this term extends to damages for mental anguish of the sort otherwise not recoverable unless for a willful tort or for an injury resulting in physical harm to the person. Consequently, our only guide to the meaning of the term "actual damages" is the settled rules of the common law.

[24, 25] Of course, the Act greatly enlarges the grounds on which damages are recoverable, and provides for trebling of actual damages, but, as we construe it, does not extend the scope of actual damages. We are unwilling to extend it by judicial fiat. The demands on the judicial system for reparation of substantial monetary losses are so great that only in exceptional circumstances should courts be required to take account of emotional distress unaccompaned by physical injury. If such damages are recoverable, then whenever a property loss is claimed, the plaintiff can always testify concerning his subjective reactions and thus inject an element of damage that can rarely be rebutted, has no monetary measure, and is subject to no limits but the sympathy of the jury and the conscience of a reviewing court. *See Harned v. E-Z Finance Co.*, 151 Tex. 641, 254 S.W.2d 81, 86 (1953).

We recognize that the intention of the Act is to allow a greater recovery of damages for deceptive trade practices than permitted by common law, but, in our view, that intention was fully expressed in the provision for trebling the actual damages proved under common-law rules applicable to the type of loss shown by the evidence. We do not think the Act can be fairly read as providing that where, as in this case, the actual loss sus-

tained was to property, the consumer may have an additional recovery for his mental anguish caused by that loss, and that this recovery, as well as his recovery for the actual loss, must then be trebled to impose a penalty substantially in excess of three times the property loss sustained. Consequently, we hold that the issue concerning mental anguish was improperly submitted to the jury and should not be submitted at another trial.

We also agree with Justice Keith's view that this question was not before the Supreme Court in *Woods v. Littleton*, 554 S.W.2d 662 (Tex.1977). Plaintiff does not contend that the question was expressly decided in *Woods*, but argues that *Woods* controls because it assumes that mental anguish is a recoverable item of damages under the Act and remands the case for a proper determination of such damages. As the opinion of the court of civil appeals in that case shows, the objection to the mental anguish issue was that the issue did not limit the damage to that which the defendant's acts produced or proximately caused. The court of civil appeals sustained this objection and remanded the case on that ground, expressly stating that it did not reach the question of recovery of damages for mental anguish. *Littleton v. Woods*, 538 S.W.2d 800, 802 (Tex.Civ.App. — Texarkana 1976). That judgment was affirmed by the supreme court, which expressly approved the holding that the mental anguish issue was defective. *Woods v. Littleton*, 554 S.W.2d 662, 672 (Tex.1977). The supreme court's main concerns were whether the Act applied to a transaction that occurred before its effective date and whether its provision for treble damages was mandatory. The question of whether mental anguish is recoverable under the Act, if not otherwise recoverable by

law, was not raised, so far as the opinion shows. Consequently, no expression of the court's view on this question was required, or even appropriate, and the court expressed no such view, even by way of obiter dictum.

[26] Although our duty is to apply the law as decided and declared by the supreme court, we are not bound by assumptions and implications in its opinions. Justice in the particular case, as well as rational and orderly development of the law, demands that the doctrine of stare decisis be limited to questions raised and decided on full consideration. *Grigsby v. Reib*, 105 Tex. 597, 153 S.W. 1124 (1913); *State v. School Trustees of Shelby County*, 150 Tex. 238, 239 S.W.2d 777 (1951); *State v. J. M. Huber Corp.*, 193 S.W.2d 882 (Tex.Civ.-App. — Austin 1946), *affirmed*, 145 Tex. 517, 199 S.W.2d 501 (1947). Otherwise, application of precedents to cases without such full consideration would inevitably result in anomaly and injustice. Consequently, we consider ourselves free in this case to construe the Act in question in accordance with our own determination of the intention of the legislature as expressed in the Act and in the light of pre-existing law.

Because of the error of the court in excluding evidence of the insurance coverage and insurance payment, the judgment of the trial court is reversed and the cause is remanded for another trial in accordance with the directions in this opinion.

Reversed and remanded.

C

CLERK'S OFFICE — SUPREME COURT

Austin, Texas, July 23, 1980

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of BROWN v. AMERICAN TRANSFER & STORAGE CO., No. B-8565 was this day overruled.

Very truly yours,

GARSON R. JACKSON,
Clerk

CARMACK AMENDMENT

§ 20, par. (11). Liability of initial and delivery carrier for loss; limitation of liability, notice and filing of claim. Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill

of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: *Provided*, That if the loss, damage, or injury occurs while the property is in the custory of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: *Provided, however*, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed

upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this title; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the commission is empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary livestock" shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: *Provided further*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further*, That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State court, only in a State through or into which the defendant carrier operates a line of railroad: *Provided further*, That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has

disallowed the claim or any part or parts thereof specified in the notice: *And provided further*, That for the purposes of this paragraph and of paragraph (12) of this section the delivering carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination: *And provided further*, That the liability imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this chapter provided. Feb. 4, 1887, c. 104, Pt. I, § 20, 24 Stat. 386; June 29, 1906, c. 3591, § 7, 34 Stat. 593; Mar. 4, 1915, c. 176 § 1, 38 Stat. 1196; Aug. 9, 1916, c. 301, 39 Stat. 441; Feb. 28, 1920, c. 91, §§ 436-438, 41 Stat. 494; July 3, 1926, c. 761, 44 Stat. 835; Mar. 4, 1927, c. 510, § 3, 44 Stat. 1448; Apr. 23, 1930, c. 208. 46 Stat. 251; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 13(b), 54 Stat. 919.

Section 20, of which this paragraph is a part, is set out in toto at pp. 93-99.

Be it enacted by the Legislature of the State of Texas:

Section 1. Chapter 17, Business & Commerce Code, as amended, is amended by adding[82] Subchapter E to read as follows:

"SUBCHAPTER E. DECEPTIVE TRADE PRACTICES AND CONSUMER PROTECTION

"Sec. 17.41. Short Title

"This subchapter may be cited as the Deceptive Trade Practices-Consumer Protection Act.

"Sec. 17.42. Waivers: Public Policy

"Any waiver by a consumer of the provisions of this subchapter is contrary to public policy and is unenforceable and void.

"Sec. 17.43. Cumulative Remedies

"The provisions of this subchapter are not exclusive. The remedies provided in this subchapter are in addition to any other procedures or remedies provided for in any other law. The provisions of this subchapter do not in any way preclude other political subdivisions of this state from dealing with deceptive trade practices.

"Sec. 17.44. Construction and Application

"This subchapter shall be liberally construed and applied to promote its underlying purposes, which are

82. V.T.C.A., Bus. & C. §§ 17.41 to 17.63.

to protect consumers against false, misleading, and deceptive practices, unconscienable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection.

"Sec. 17.45. Definitions

"As used in this subchapter:

"(1) 'Goods' means tangible chattels bought for use.

"(2) 'Services' means work, labor, and services for other than commercial or business use, including services furnished in connection with the sale or repair of goods.

"(3) 'Person' means an individual, partnership, corporation, association, or other group, however organized.

"(4) 'Consumer' means an individual who seeks or acquires by purchase or lease, any goods or services.

"(5) 'Merchant' means a party to a consumer transaction other than a consumer.

"(6) 'Trade' and 'commerce' mean the advertising, offering for sale, sale, lease, or distribution of any good or service, of any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value, wherever situated, and shall include any trade or commerce directly or indirectly affecting the people of this state.

"(7) 'Documentary material' includes the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever situated.

"(8) 'Consumer protection division' means the antitrust and consumer protection division of the attorney general's office.

"(9) 'Knowingly' means actual awareness of the falsity or deception, but actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

"Sec. 17.46. Deceptive Trade Practices Unlawful

"(a) False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

"(b) The term 'false, misleading, or deceptive acts or practices' includes, but is not limited to, the following acts:

"(1) passing off goods or services as those of another;

"(2) causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

"(3) causing confusion or misunderstanding as to affiliation, connection or association with, or certification by, another;

"(4) using deceptive representations or designations of geographic origin in connection with goods or services;

"(5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not;

"(6) representing that goods are original or new if they are deteriorated, reconditioned, reclaimed, used, or secondhand;

"(7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

"(8) disparaging the goods, services, or business of another by false or misleading representation of facts;

"(9) advertising goods or services with intent not to sell them as advertised;

"(10) advertising goods or services with intent not to supply a reasonable expectable public demand, unless the advertisement's disclosed a limitation of quantity;

"(11) making false or misleading statements of fact concerning the reasons for, existence of, or amount of price reductions;

"(12) representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law;

* * * *

"(c) It is the intent of the legislature that in construing Subsection (a) of this section the courts to the extent possible will be guided by Subsection (b) of this section and the interpretations given by the Federal Trade Commission Act [15 U.S.C.A. 45(a)(1)].

"Sec. 17.49. Exemptions

"(a) Nothing in this subchaper shall apply to the owner or employees of a regularly published newspaper,

magazine, or telephone directory, or broadcast station, or billboard, wherein any advertisement in violation of this subchapter is published or disseminated, unless it is established that the owner or employees of the advertising medium have knowledge of the false, deceptive, or misleading acts or practices declared to be unlawful by this subchapter, or had a direct or substantial financial interest in the sale or distribution of the unlawfully advertised good or service. Financial interest as used in this section relates to an expectation which would be the direct result of such advertisement.

"(b) Nothing in this subchapter shall apply to acts or practice authorized under specific rules or regulations promulgated by the Federal Trade Commission under Section 5(a)(1) of the Federal Trade Commission Act [15 U.S.C.A. 45(a)(1)]. The provisions of this subchapter do apply to any act or practice prohibited or not specifically authorized by a rule or regulation of the Federal Trade Commission. An act or practice is not specifically authorized if no rule or regulation has been issued on the act or practice.

"Sec. 17.50. Relief for Consumers

"(a) A consumer may maintain an action if he has been adversely affected by any of the following:

"(1) the use or employment by any person of an act or practice declared to be unlawful by Section 17.46 of this subchapter;

"(2) a failure by any person to comply with an express or implied warranty;

"(3) any unconscionable action or course of action by any person; or

(4) the use or employment by any person of an act or practice in violation of Article 21.21, Texas Insurance Code, as amended, or rules or regulations issued by the State Board of Insurance under Article 21.21, Texas Insurance Code, as amended.

"(b) In a suit filed under this section, each consumer who prevails may obtain:

"(1) three times the amount of actual damages plus court costs and attorneys' fees reasonable in relation to the amount of work expended;

"(2) an order enjoining such acts or failure to act;

"(3) orders necessary to restore to any party to the suit any money or property, real or personal, which may have been acquired in violation of this subchapter; and

"(4) any other relief which the court deems proper, including the appointment of a receiver or the revocation of a license or certificate authorizing a person to engage in business in this state of the judgment has not been satisfied within three months of the date of the final judgment. The court may not revoke or suspend a license to do business in this state or appoint a receiver to take over the affairs of a person who has failed to satisfy a judgment if the person is a licensee of or regulated by a state agency which has statutory authority to revoke or suspend a license or to appoint a receiver or trustee.

"(c) On a finding by the court that an action under this section was groundless and brought in bad faith or for the purpose of harassment, the court may award to the defendant reasonable attorneys' fees in relation to the amount of work expended, and court costs.

"Sec. 17.54. Damages: Defense

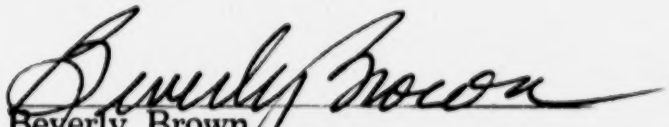
"No award of damages may be given in any action filed under Section 17.51 of this subchapter if the defendant:

"(1) proves that the action complained of resulted from a bona fide error notwithstanding the use of reasonable procedures adopted to avoid any error; and

"(2) made restitution of any consideration received from any member of the class.

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of October, 1980, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Carl David Adams, Adams & Mims, Campbell Centre II, Suite 255, 8150 N. Central Expressway, Dallas, Texas 75206, counsel for the Respondent. I further certify that all parties required to be served have been served.



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80-696

FILED
OCT 27 1980
JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. .....

AMERICAN TRANSFER AND STORAGE COMPANY,
Petitioner,

v.

RAYMOND J. BROWN,
Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

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October 24, 1980

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Raymond J. Brown, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Supreme Court of Texas' opinion in this case. That opinion is reported at 601 S.W.2d 931 (Tex. 1980).

STATEMENT OF THE CASE

Respondent, Raymond J. Brown, disagrees with the Statement of the Case found on Pages 3-6 of the Petition for Writ of Certiorari filed by American Transfer and Storage

Company. In Petitioner's Statement of the Case, the important and salient details giving rise to Petitioner's liability are completely omitted. Rather, much of the Statement of the Case is devoted to recitations concerning the issuance of an Order for Services and the Bill of Lading. Additionally, undue attention is given to facts which were not important to Respondent's cause of action. The factual summary contained in the Petition creates the misimpression that Respondent's recovery arose out of an interstate contract of carriage and the documents related thereto. This is not a correct statement of the facts giving rise to liability in this case.

Respondent sued Petitioner solely upon the theory that its statements and representations made prior to the decision by Respondent to employ Petitioner as a carrier were violative of the Texas Deceptive Trade Practices — Consumer Protection Act. This distinction, and the importance thereof, is recognized in the opinions of both the Supreme Court of Texas and the Court of Civil Appeals. The significance of this misplaced emphasis of the facts permeates Petitioner's entire case and will be more closely addressed in Subpart C of this brief.

REASONS WHY THE WRIT SHOULD BE DENIED

1. **The Texas statute in question does not govern or attempt to govern subject matters covered by the federal act in question.**
2. **There is no conflict between the Texas statute in question and the federal act in question.**
3. **The Texas statute in question is a legitimate exercise of the police power of the State of Texas to protect its citizens against consumer fraud and misrepresentations.**

4. **Respondent's recovery is not based upon a claim for damages to goods shipped in interstate commerce, but rather is based upon a claim for misrepresentations involved in a Texas consumer transaction.**

ARGUMENT AND AUTHORITIES

The points raised by Petitioner in its Petition concern the issue of federal preemption. Petitioner alleges that the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. Section 20(11), preempts any attempt by the State of Texas to prohibit false, misleading and deceptive trade practices occurring within the State of Texas in consumer transactions by persons whose liabilities for breach of interstate contracts of carriage are controlled by the Carmack Amendment. The argument of Respondent will be divided into three (3) subparts: (A) there can be no preemption because the state and federal statutes in question deal with different subject matters and do not conflict or overlap; (B) the state statute in question is a legitimate exercise of the police power by the State of Texas to protect its citizens against consumer fraud and misrepresentation; and (C) Respondent's recovery is based upon consumer misrepresentations occurring prior to the formation of any contract for interstate carriage, and is not a claim for breach of such interstate contract of carriage.

SUBPART A

There can be no preemption because the state and federal statutes in question deal with different subject matters and do not conflict or overlap.

The Texas Deceptive Trade Practices — Consumer Protection Act (embodied in the TEXAS BUSINESS AND COMMERCE CODE Sections 17.42-17.50), applies to false,

misleading and deceptive acts or practices in consumer transactions within the State of Texas.[1] The Texas statute prohibits a lengthy list of unlawful practices as being false, misleading or deceptive acts and practices. *(Section 17.46(b) §§1-23, TEXAS BUSINESS AND COMMERCE CODE).* Two (2) of these prohibited practices were found to have been violated in the case at bar by Petitioner. These sections are as follows:

> "The term "false, misleading, or deceptive acts or practices" includes but is not limited, to the following acts:
>
> * * *
>
> (5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not have;
>
> * * *
>
> (7) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another". *TEXAS BUSINESS AND COMMERCE CODE, Sections 17.46(b)(5) and (7).*

The Texas statute does not purport to govern the transportation industry specifically or to set out any terms for

---

[1] "Consumer transactions" are defined by the act as any transaction wherein a consumer seeks or acquires goods or services (Section 17.45(4), *TEXAS BUSINESS AND COMMERCE CODE)* from any person engaged in trade and commerce i.e. the advertising, offering, or distribution of any good or service which directly or indirectly effects the people in the State of Texas. (Section 17.45(6), *TEXAS BUSINESS AND COMMERCE CODE.)*

recovery of damages to goods shipped in interstate commerce. The Texas courts in the case at bar have held that it deals exclusively with deceptive trade practices rather than interstate shipments or other transactions in interstate commerce. *American Transfer and Storage Company vs. Brown*, 584 S.W.2d 284 (Tex. Civ. App., Dallas, 1979) and 601 S.W.2d 931 (Tex. 1980).

The subject matter of the federal statute, on the other hand, is the liability of initial and connecting carriers for loss or damage to goods in interstate shipments, together with the issuance of bills of lading, contractual limitations of liability, and notice and filing of claims. (49 U.S.C. §20(11)). With regard to this subject matter, this Court has held that the federal legislation supercedes all state regulation of this field. *Adams Express Company vs. Croninger*, 226 U.S. 491, 57 L.Ed. 314, 36 S.Ct. 148 (1912).

In the present case, however, the Texas statute makes no attempt to regulate any of the matters regulated by the Carmack Amendment and does not present any obstacle to the full accomplishment of the uniformity sought by the Carmack Amendment with regard to the regulation of contracts of carriage in interstate commerce and claims arising out of such contracts. It was this distinction that led the Court of Civil Appeals and the Supreme Court of Texas to hold that protection of interstate shippers from deceptive trade practices was a subject which Congress chose to leave to the police powers of the several states. *American Transfer and Storage Company vs. Brown*, 584 S.W.2d 284 (Tex. Civ. App., Dallas, 1979), at 289 and 601 S.W.2d 931 (Tex. 1980) at 938.

The courts below held that the Carmack Amendment, though comprehensive in its regulation of contracts of car-

riage in interstate commerce, does not attempt to regulate misrepresentations or deceptive trade practices taking place prior to the formation of the contract for interstate shipment. *American Transfer and Storage Company vs. Brown*, 584 S.W.2d 284 (Tex. Civ. App. Dallas, 1979), at 289 and 601 S.W.2d 931 (Tex. 1980) at 938. The courts therefore reasoned that, in the absence of federal attempts to speak to the subject, it is a matter to be left to the states to regulate.

In summary, the Texas statute in question does not purport to govern carriers or their liabilities arising out of the contract of interstate carriage. Rather, the statute deals exclusively with false and misleading practices wherein Texas consumers are induced to enter into transactions through fraudulent and deceptive practices. Since this purpose is one which remains outside the ambit of the Carmack Amendment, it is clear that there is no attempt by the state and federal statutes to occupy or regulate the same fields of interest.

SUBPART B

The state statute in question is a legitimate exercise of the police power by the State of Texas to protect its citizens against consumer fraud and misrepresentation.

The Texas statute in question was inacted to "protect consumers against false, misleading and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection". *Section 17.44, TEXAS BUSINESS AND COMMERCE CODE.* As such, it is clearly an attempt by the State of Texas to exercise its police power to safeguard

and protect its citizens from harm and loss visited upon them by the prohibited practices. Speaking to the application of the statute to the case at bar, the Supreme Court of Texas used the following language:

> "We also conclude that the DTPA's (Deceptive Trade Practices Act) prohibitions against false, misleading and deceptive acts protects a deeply rooted state interest and is an exercise of the right of the State of Texas to protect its citizens from acts such as those committed by American Transfer. *Florida Lime and Avocado Growers, Inc. vs. Paul*, 373 U.S. 132, 10 L.Ed.2d 248, 83 S.Ct. 1210, (1963)". (explanation added). *Brown vs. American Transfer and Storage Company*, 601 S.W.2d 931 (Tex. 1980), at 938.

The regulation and control of consumer fraud and deceptive trade practices falls within a field which has been traditionally occupied by the states. As such, preemption should only be found if "that was the clear and manifest purpose of Congress". *Rice vs. Santa Fe Elevator Corporation*, 331 U.S. 218, 230, 91 L.Ed. 1447, 67 S.Ct. 1146 (1947). In such cases, this Court has indicated that a presumption in favor of the historic police powers of the states in these areas will not be superceded by federal law unless the purpose of Congress to do so is clear and manifest. *Rice vs. Santa Fe Elevator Corporation, supra.* This Court has recently stated that "this assumption provides assurance that 'the federal-state balance', *U.S. vs. Bass*, 404 U.S. 336, 349, 30 L.Ed.2d 488, 92 S.Ct. 515 (1971), will not be disturbed unintentionally by Congress or unnecessarily by the Courts." *Jones vs. Rath Packing Company*, 430 U.S. 519, 51 L.Ed.2d 604, 97 S.Ct. 1305 (1977).

In areas dealing with the health and welfare of a state or its citizens, this Court has repeatedly held that states and their instrumentalities may act concurrently with the federal

government even though such action involves certain areas of interstate commerce. In the case of *Huron Portland Cement Company vs. City of Detroit*, 362 U.S. 440, 4 L.Ed.2d 852, 80 S.Ct. 813 (1960), this Court upheld a city ordinance controlling smoke emissions which had come under attack as constitutionally preempted by the Federal Admiralty Extension Act. In sustaining the ordinance this Court stated:

> "The ordinance was inacted for the manifest purpose of promoting the health and welfare of the city's inhabitants. Legislation designed to free from pollution the very air that people breath clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government". *Huron Portland Cement Company vs. Detroit, supra*, at 442.

In upholding the Detroit ordinance, this Court determined that local regulations may effect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution. *Huron Portland Cement Company vs. Detroit, supra*, at 444.

These principals of law have guided this Court in numerous cases to conclude that federal and state law should be allowed to co-exist unless the express terms of the federal statute command otherwise or unless the state and federal statutes conflict to such an extent that they cannot stand concurrently. See *Askew vs. American Waterways Operator*, 411 U.S. 325, 36 L.Ed.2d 280, 93 S.Ct. 1590 (1973); *Douglas vs. Sea Coast Products, Inc.*, 431 U.S. 265, 52 L.Ed.2d 304, 97 S.Ct. 1740, (1977); *Florida Lime and Avocado Growers, Inc. vs. Paul*, 373 U.S. 132, 10 L.Ed2d 248, 83 S.Ct. 1210

(1963); *City of Philadelphia vs. State of New Jersey*, 437 U.S. 617, 57 L.Ed.2d 475, 98 S.Ct. 2531 (1978).

In the case at bar, the attempt by the Texas Legislature to clear the smoke of fraud and deceit from the commercial air in consumer transactions within the State of Texas can be compared with the Detroit ordinance in the *Huron* case, *supra*, and its attempt to clear smoke from the air. It certainly is inacted to protect the welfare of Texas citizens in the market place, and while it may apply to an interstate carrier who engages in these unlawful practices prior to the formation of the contract for interstate shipment, such application is not shown to be discriminatory against interstate commerce or to present any obstacle to the purposes expressed in the federal act in question. The State of Texas certainly has a legitimate state interest in protecting its citizens from deceptive practices of this nature. In the absence of an attempt by Congress to undertake national guidelines in the field of consumer protection in interstate shipments, the above cited cases dictate that these matters are left to the police powers of the several states for regulation and control.

SUBPART C

Respondent's recovery is based upon a claim for misrepresentations occurring prior to the formation of the contract for interstate carriage and is not a claim for damage to goods falling within the scope of the Carmack Amendment.

As has previously been noted in the Statement of the Case in this brief, Petitioner's Statement of the Case and presentation of Questions Presented For Review in its Petition, attempt to characterize the claim of Respondent as "a claim for damages to interstate shipment of goods" (see Questions Presented For Review, Number 1, at Page 2 of

Petitioner's Petition for Writ of Certiorari). Petitioner's error in this regard permeates the entirety of its case. Both the Court of Civil Appeals and the Supreme Court of Texas stated in their opinion that the claim of Raymond J. Brown was not one for damages to the goods shipped in interstate commerce, but, rather, was solely based upon the misrepresentations and false statements made by American Transfer and Storage Company's agent prior to the formation of the contract between Brown and American Transfer for the shipment of his goods.

The opinion of the Supreme Court of Texas, reproduced in its entirety in Subsection A of the Appendix of the Petition, states:

> "Brown contended the liability of the packing company rested solely on the DTPA and not on the contract of carriage. He alleged he had been induced into the contract for carriage by American Transfer's misleading and deceptive representations and because of the misrepresentations he had been damaged." *Raymond J. Brown vs. American Transfer & Storage Company*, 601 S.W.2d 931 (at Page A-18 of Petitioner's Appendix A).

The opinion of the Court of Civil Appeals in the case at bar likewise acknowledged the distinction between Respondent's cause of action and a claim for damages arising out of a contract for carriage. It stated:

> "Plaintiff asserts that his claim is not based on the contract of carriage or on any rule of carrier liability, under either statute or common law, but that it rests solely on the Texas Deceptive Trade Practices Act." *American Transfer & Storage Company vs. Raymond J. Brown*, 584 S.W.2d 284 (at B-10 of Petitioner's Appendix B).

Despite the repeated characterizations by Respondent and the Courts below of the cause of action as one for mis-

representation and consumer fraud as opposed to a claim for damages to goods shipped in interstate commerce, Petitioner refuses to acknowledge the distinction and the difference. Petitioner continues to maintain that the action is one for violation of an interstate contract of carriage, and hence falling within the terms of the Carmack Amendment. This mischaracterization by Petitioner only serves to more clearly define for the Court the differences between the Texas statute and the Federal legislation in question. Respondent's cause of action exists separate and apart from the contract of carriage and is totally unrelated thereto.

Petitioner mistakenly says that "Petitioner was not shown to have caused any loss of or damage to Respondent's goods". (see Petitioner's Brief Page 7). This is a misstatement of the record in the case. The jury's answers to Special Issues Two and Six (found in the opinion of the Court of Civil Appeals at Page B-27 and B-28 of Petitioner's Appendix B), clearly show that the jury found the misrepresentations to have been a producing cause of the damages to Raymond J. Brown. Despite being a factual misstatement of the case, this error points out the glaring oversimplification by Petitioner in the case at bar. The factual summary found in the opinion of the Supreme Court of Texas (on Page A-7 and A-8 of Petitioner's Appendix A), clearly indicates that Respondent's cause of action arose out of gross misstatements concerning the method of operation to be employed by American Transfer in the shipment. The jury found that these misrepresentations did cause Respondent's damages, without regard to proof of where the actual physical injury and damages occurred or in whose hands the goods were at the time of such damages. This jury finding of causation has never been attacked by Petitioner on any evidentiary grounds, and hence stands unchallenged.

The cases cited by Petitioner only lend further support to the distinction in the case at bar. All of the authorities cited by Petitioner deal with attempts by states, through legislation or interpretation of common law principals, to add to, alter, or in some form redefine the liability of carriers for loss of and damages to interstate shipments. As shown in Subpart A of this brief, the State of Texas has made no such attempt in the case at bar. The continued and persistent efforts of Petitioner to wrongfully characterize Respondent's claim as one for damages to goods shipped in interstate commerce as opposed to misrepresentation, should not be embraced by this Court.

In summary, the State statute in question deals with a subject matter not spoken to by the Federal statute, and is a legitimate exercise of the police power of the State of Texas. Federal preemption does not present itself in such a case. The continued insistence upon carrier liability by Petitioner cannot confuse the clear differences between the two statutes before the Court.

CONCLUSION

Based upon the foregoing authorities, Respondent prays that the Petition for Writ of Certiorari be denied, and that all costs associated with this matter be taxed against the Petitioner, American Transfer and Storage Company.

Respectfully submitted,

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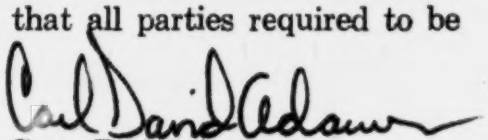
CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of October, 1980, sufficient copies of the foregoing Brief in Opposition were mailed, postage prepaid to Duncan Boeckman, 2300 Republic National Bank Tower, Dallas, Texas 75201, Counsel for Petitioner. I further certify that all parties required to be served have been served.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NO. _____

AMERICAN TRANSFER AND
STORAGE COMPANY,
Petitioner

v.

RAYMOND J. BROWN,
Respondent

BRIEF OF AMICUS CURIAE MAYFLOWER WAREHOUSEMEN'S ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

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STATEMENT OF INTEREST OF MAYFLOWER WAREHOUSEMEN'S ASSOCIATION, INC. IN THE OUTCOME OF THIS CASE

Mayflower Warehousemen's Association, Inc. (MWA) is a voluntary association consisting exclusively of the franchised agents of the Aero Mayflower Transit Company, Inc. MWA is an Indiana not-for-profit corporation originally chartered by the State of Indiana on February

6, 1935. MWA's principal and only office is located at 9247 North Meridian Street, Suite 120, Indianapolis, Indiana 42620.

Each member-agent of MWA is an independent business franchised by the Aero Mayflower Transit Company, Inc. of Indianapolis, Indiana. Most of the MWA membership consists of small, family-owned companies having only one location. These member-agents, however, represent Aero Mayflower Transit Company, Inc. in every state of the United States and, in 1978, generated sales in excess of $160 million.

Because each of its member-agents operates as agent of an interstate carrier, MWA has a great deal of concern over the Texas Supreme Court decision in this case. In spite of a comprehensive federal scheme regulating interstate carriers, MWA's member-agents now find themselves potentially liable under state law for damages to shipments. MWA has an interest in maintaining a uniform system of law dealing with claims of this type.

POINT OF ERROR

BECAUSE FEDERAL LAW PREEMPTS ANY STATE CAUSE OF ACTION REGARDING GOODS DAMAGED IN INTERSTATE COMMERCE, THE TEXAS SUPREME COURT ERRED WHEN IT APPLIED THE TEXAS DECEPTIVE TRADE PRACTICES ACT TO THE FACTS OF THIS CASE.

SUMMARY OF THE ARGUMENT

The writ should be granted because the decision of the Texas Supreme Court is contrary to settled principles

of the federal preemption doctrine. The decision must be reversed to preserve a uniform federal rule of liability for damages to interstate shipments. Maintenance of such a rule is one of the purposes of the Carmack Amendment. Permitting a shipper to recover treble damages and attorney fees under the Texas Deceptive Trade Practices —Consumer Protection Act (DTPA) when the shipper's sole injury is damage to an interstate shipment frustrates that purpose of the Carmack Amendment. Although Respondent characterized his lawsuit as one under the state deceptive trade practices law, it was in substance an action to recover for damages to an interstate shipment. Federal decisions have established that federal law governs the entire relationship between carrier and shipper, and more specifically that a carrier's liability is governed by federal law even when the carrier has misrepresented its services to the shipper. The decision of the Texas Supreme Court is contrary to these federal decisions. Moreover, the authority relied on by the Texas Supreme Court does not support its decision. Accordingly, the writ should be granted.

ARGUMENT AND AUTHORITIES UNDER POINT OF ERROR

A single, uniform federal rule governing an interstate carrier's liability for damages to shipped goods is essential to the proper operation of the federal regulatory scheme that provides uniform rate schedules for all shippers in interstate commerce. A carrier's exposure to liability for damages is one aspect of its cost of operation, and by the provisions of the Carmack Amendment, 49 U.S.C. § 20(11), Congress has established precisely how and to what extent a carrier is liable for damages "caused by

it." The Carmack Amendment permits a carrier to *limit* its liability in some circumstances to the value of the shipment as declared by the shipper, but in *no* circumstance can the carrier be liable in an amount *greater* than the actual loss, damage, or injury to the goods shipped. The ruling of the Texas Supreme Court, however, exposes a carrier to liability for three times the actual damage to the property and for attorney fees. This exposure is based on state law, and if the ruling is permitted to stand, carriers and shippers alike will be deprived of the uniformity that federal regulation of interstate carriage of goods is intended to provide.

The question is whether the federal legislation preempts the state legislation. The Texas Supreme Court erroneously concluded that the state legislation, the Texas Deceptive Trade Practices—Consumer Protection Act (DTPA), Tex. Bus. & Com. Code Ann., tit. 2, § 17.46, is not preempted. The court's error was predicated on a mistaken view of the applicable law concerning preemption. The Texas Supreme Court insisted that the state legislation is not preempted, obviously focusing on the different *purposes* of the two statutes:

> [T]he Carmack Amendment applie[s] only to the liability of a carrier for its breach of contract, and the DTPA [is] a general statute, which provide[s] remedies for persons victimized by false, misleading and deceptive acts within the police power of the state. Thus, . . . the prime object of the Carmack Amendment [is] to create a uniform rule of responsibility for interstate commerce and interstate commerce bills of lading, and . . . a DTPA suit for misrepresentation made prior to contract does not fall within the ambit of federal regulations.

Brown v. American Transfer & Storage Co., 601 S.W. 2d 931, 938 (Tex. 1980).

As this Court made clear in *Perez v. Campbell*, 402 U.S. 645, 649-52 (1971), the test of preemption is not whether the purpose of the state law is different from the purpose of the federal law. Rather, the test is whether the state legislation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), *quoted in Perez v. Campbell*, 402 U.S. 645, 649 (1971). The purpose of the federal legislation is of paramount importance. If the operation of a state law in a particular case interferes with or otherwise impedes the full achievement of that purpose, the state law must yield even though it was enacted to address an entirely separate evil. Just such a situation is presented here. Although the purpose of the DTPA—to protect consumers from deceptive trade practices—is different from the objective of the Carmack Amendment, the practical effect of permitting a DTPA recovery from the carrier in this case is to increase substantially the carrier's liability for goods damaged in transit. It should be obvious that this result impedes the full accomplishment of the Carmack Amendment's objective of establishing "a uniform rule of responsibility as to interstate commerce and interstate commerce bills of lading." *Atchinson, T. & S.F. Ry. v. Harold*, 241 U.S. 371 (1916).

The Texas Supreme Court perceived a distinction between an action under the DTPA to recover for damages to goods caused by a carrier's misrepresentations and one brought pursuant to the Carmack Amendment to recover damages for the same actual injury, but based upon the

carrier's responsibility under the bill of lading. The authorities discussed above make it clear, however, that the fact that the two statutes seek to remedy distinguishable wrongs is irrelevant to the preemption question. The focus of the preemption inquiry is whether the state legislation obstructs the achievement of the purpose of the federal legislation. The proper inquiry in this case is whether a uniform rule of liability regarding damage to interstate shipments under a bill of lading can coexist with a state statute that permits recovery of three times the maximum damages recoverable under the federal statute when (1) the carrier misrepresents the service to be provided under the bill of lading *and* (2) the shipment is damaged in transit. MWA submits that the federal purpose cannot be effectuated if a shipper can recover under the terms of the state statute in these circumstances.

The distinction between the federal statute and the state statute perceived by the Texas Supreme Court simply does not speak to the issue of preemption. First, on the facts of this case it is a distinction without a difference. The misrepresentations complained of concern the manner in which the contract was to be performed. In essence, no matter how characterized respondent's complaint is and always has been that the failure to perform the contract as represented resulted in damage to his property. Respondent's claim is therefore essentially one for a breach of contract. Second, even assuming the misrepresentations in this case can be distinguished from the contract for interstate shipment, federal decisions indicate that the Carmack Amendment governs the *entire* relationship between shipper and carrier with respect to liability for damaged shipments. Third, and more specifically, federal courts have already been presented with

lawsuits alleging that a shipper was induced to contract with a carrier by the carrier's misrepresentations and have uniformly held that *federal* law governs the carrier's liability for damaged shipments.

1. The misrepresentations complained of by respondent concern the manner in which petitioner would perform the contract, such as how respondent's goods would be packed and transported. Under the DTPA, these representations, even if false, were not actionable until petitioner's failure to honor them caused respondent some actual damage. Tex. Bus. & Com. Code Ann., tit. 2, § 17.50(a). Respondent was not damaged until the carrier failed to deliver the goods as promised. In other words, respondent had no cause of action under state law until he had the cause of action under the Carmack Amendment. To draw a distinction between the two is to exalt form over substance, and in doing so to destroy the uniformity of the Carmack Amendment's liability provisions. Hereafter, a shipper from Texas who can show that the carrier's representations concerning the manner in which the goods would be shipped were not accurate can recover treble damages under state law, notwithstanding that the shipper's only injury is the damage to his goods in shipment, which is precisely the injury that the Carmack Amendment was intended to regulate.

2. Even if the misrepresentations are considered apart from the contract to which they referred, the courts have already held that the Carmack Amendment was intended to regulate the *entire* relationship between shipper and carrier and not merely the carrier's responsibility while the goods are actually being moved. As the court said in

Sylgab Steel & Wire v. Strickland Transportation Co., 270 F.Supp. 264 (E.D. N.Y. 1967):

> State and federal courts have properly been reluctant to divide the relationship between interstate carriers and shippers into discrete parts, some governed by federal and some by state law. . . . The courts tend to view events in interstate commerce as part of a total transaction which extends beyond the actual movement across state lines.

270 F. Supp. at 270.

The misrepresentations complained of in this case were certainly part of the relationship between the shipper and the carrier. Moreover, according to respondent's own theory of the case, the representations were intimately connected with the contract for the interstate shipment, since respondent claimed that the carrier's misrepresentations induced him to contract. 601 S.W.2d at 931. In *Sylgab,* the plaintiff wanted to maintain his action in a state court, and in order to do so argued that the lawsuit arose out of a post-delivery agreement to repair between the shipper and the carrier. The plaintiff suggested that federal law covered "only those matters specifically dealt with in the Carmack amendment—limitations on liability and responsibility of originating carrier for connecting carrier delicts—and not all aspects of liability for damage to goods carried under an interstate bill of lading." 270 F. Supp. at 267. The court rejected this argument, holding that when the asserted basis of the lawsuit.

> is so closely connected to the agreement embodied in the bill of lading as to constitute at most a clarification or modification of that agreement it is governed by federal law. The federal pre-emptive tent

> over the main attraction, the bill of lading, covers what is essentially a side-show, the agreement by the carrier to repair.

Id. at 270.

To permit respondent in this case to separate artificially the representations made concerning the contract from the contract itself will engender a disastrous balkanization of the substantive law governing carrier liability to shippers. There will no longer be one rule of liability governing the entire relationship of carrier and shipper, but several: the federal rule will be narrowly confined to actual interstate events whenever a state law permits a more liberal recovery for the same damage based on a different cause of action. Such a result is totally contrary to the purpose of the Carmack Amendment, and poses a severe threat to the federal policy of imposing a uniform rule of liability on such shipments.

3. The federal courts have decided that even when a shipper is induced to contract with an interstate carrier by the carrier's fraud or misrepresentation, the shipper's recovery is governed by federal law—specifically, the measure of recovery permitted by the Carmack Amendment. In *Mitchell v. Union Pacific R. Co.*, 188 F. Supp. 869 (S.D. Cal. 1960), a shipper sued to recover the actual value of his pet dog Pudsy, "the wonder dog of Ireland." Mitchell had entered into a contract for interstate shipment of Pudsy by rail, and had declared the animal's value to be $25. The dog died in transit due in part to the railroad's negligence. Mitchell sued to recover the full value of the dog, and the railroad defended on the ground that the value declaration and tariff provisions limited the carrier's liability to the declared value

of $25. The jury found that the railroad had induced the plaintiff to enter into the contract through fraud, and the court held that the railroad's fraud "vitiated the value declaration and the tariff provisions which would limit the liability." 188 F. Supp. at 874. The court determined however, that the plaintiff's right to recover the actual damages was still governed by federal, not state, law. *Id.* at 871-72. Significantly, the misrepresentations at issue in *Mitchell* concerned the manner in which Pudsy would be transported by the carrier, precisely the kind of misrepresentation at issue in this case.

Similarly, in *Paine-Henderson v. Eastern Greyhound Lines, Inc.*, 320 F. Supp. 1138 (D.S.C. 1970), the defendant bus line lost the plaintiff's luggage, which contained the only copies of two manuscripts written by the plaintiff. The plaintiff based his action on a theory of fraud, alleging that the ticket agent represented the bus as a through bus to Washington, D.C., when it was not; and alleging that the plaintiff would not have boarded the bus if he had known it was not a through bus. The defendant moved for a summary judgment that its liability was limited to $50, in accordance with the limitation of liability contained in its tariff as permitted by the Carmack Amendment. The court denied the motion, holding that if the plaintiff could prove that the carrier's misrepresentations induced him to enter into the contract for carriage, the plaintiff could avoid the limitation of liability contained in the tariff and sue for the actual value of the items lost. The court insisted, however, that since "the transaction involved was in interstate commerce, . . . *federal law applies to all phases of the case.*" 320 F. Supp. at 1139. (emphasis added).

The case of *Chandler v. Aero Mayflower Transit Co.*, 374 F.2d 129 (4th Cir. 1967), illustrates precisely the inequity that will result if the decision of the Texas Supreme Court in this case is permitted to stand. In *Chandler*, the plaintiff shipper alleged that his signatures on a bill of lading and an order for services, both of which contained a limitation of liability, were obtained by fraudulent misrepresentations. When his household goods were destroyed in transit by fire, he sued to recover their full value. The district court granted the carrier's motion for a directed verdict that the shipper recover only the released value of the goods, and the Fourth Circuit reversed. The court first determined that the action was *not* governed by the legal effect of the bill of lading, because the bill of lading had not been delivered to the shipper. 374 F.2d at 134. Rather than look to state law, however, the Fourth Circuit said "[t]he resolution of this controversy . . . is grounded ultimately in federal statutory law and specifically in the terms of [the Carmack Amendment,] 49 USC. § 20(11)." *Id.*

In the instant case, the Texas Supreme Court held that even though there was a bill of lading, the controversy was controlled by state law because respondent grounded his action on misrepresentations made prior to the contract for carriage. Yet precisely the same kind of factual circumstances were present in *Chandler*. The Fourth Circuit noted that an employee of the carrier's agent "admitted that in discussing the carrier's services with the shipper he misinformed and mislead him into possibly believing that the [limitation of liability] did not apply to recovery for damages or loss of property caused by the fault or negligence of the carrier." *Id.* at 133 (footnote omitted). This misrepresentation, made

before the shipper entered into any agreement with the carrier, would form the basis of a cause of action under the provision of the DTPA that proscribes representations "that an agreement confers or involves rights, remedies, or obligations which it does not have or involve. . . ." Texas Bus. & Com. Code Ann., tit. 2, § 17.46(b)(12). Under the Fourth Circuit's view of the law, however, the shipper's rights were governed entirely by the Carmack Amendment, even in the absence of a bill of lading and even given fraudulent misrepresentations made prior to any agreement between the shipper and the carrier. Were the case to arise today in Texas, however, the Texas Supreme Court's ruling in the case presented for review would permit the shipper to avoid federal law by characterizing his action as one governed by state law because it arose from misrepresentations made prior to the contract. The inequity engendered by this ruling is highlighted by the Fourth Circuit's flat statement in *Chandler* that "the plaintiff shipper is not entitled in this action to recover from the carrier punitive damages. *See* 49 U.S.C. § 20(11). . . ." *Id.* at 137 (citing cases). It is clear from the cases cited by the Fourth Circuit that, in the event the shipper proved at trial that he had been deceived by the carrier's misrepresentations, the carrier's liability would be confined to the *actual damage* to the shipment. Respondent in this case, however, has been permitted to recover three times his actual damages. Thus, the evil of the Texas Supreme Court's ruling is not only that it upsets the design of the Carmack Amendment to provide a uniform rule of responsibility upon which carriers can depend; the ruling also results in widely disparate treatment of shippers who use interstate carriers. Clearly, then, the Texas Supreme Court's ruling

stands as an obstacle to the full achievement of the purpose of the Carmack Amendment "to impose a single uniform federal rule upon the obligations of carriers operating in interstate commerce." *Rocky Ford Moving Vans, Inc. v. United States,* 501 F.2d 1369 (8th Cir. 1974).

Last, it should be noted that none of the authorities relied on by either the Texas Court of Civil Appeals or the Texas Supreme Court support respondent's position. In *Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440 (1960), relied on by the Court of Civil Appeals, this Court upheld a local ordinance primarily because that ordinance sought to regulate pollution from steamship boilers. "The Ordinance was an act for the manifest purpose of promoting the health and welfare of the City's inhabitants," *id.* at 442, which, unlike the regulation of deceptive trade practices, clearly falls within the most traditional concept of police power, *Jacobson v. Massachusetts,* 197 U.S. 11 (1905). In the other case relied on by the Court of Civil Appeals, *Askew v. American Waterways Operators, Inc.,* 411 U.S. 325 (1973), the federal statute expressly provided, "nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such State." *Id.* at 329. Moreover, the federal statute provided merely for the recovery by the United States of its costs for cleaning up oil spills; the Supreme Court found no obstacle to a state's recovering its own cleanup costs or to a private party's recovering its damages. Far from burdening the operation of the federal statute, the state statute complemented and extended federal law. By contrast, the application of the

DTPA would contravene the very purpose behind the Carmack Amendment, namely, providing uniform regulation of interstate carriers.

The Texas Supreme Court cited only *Florida Lime & Avocado Growers v. Paul,* 373 U.S. 132 (1963), in its opinion on this point. The crucial distinction between that case and this one is that in *Florida Lime & Avocado Growers* the federal law in issue was intended to establish *minimum standards* applicable to the commerce regulated. 373 U.S. at 138. This Court determined that there was no collision between federal regulations prescribing minimum standards for goods entering the stream of commerce and more demanding state standards for the same goods when marketed within the state. *Id.* at 141-47. Since the promulgation of minimum standards constituted only "partial congressional superintendence of the field," *id.* at 145, there was room for state superintendence of a more exacting sort. The Court noted, however, that if the federal legislation established a *maximum* standard, a state regulation requiring more would inevitably conflict with the state law. *Id.* at 143. In the instant case, Congress has established a rule governing the entire liability relationship of carrier and shipper. Any state law that increases or decreases the liability of a carrier for covered shipments strikes at the very core of that legislation, and must yield under preemption principles to the federal legislation.

CONCLUSION

The decision of the Texas Supreme Court is contrary to fundamental principles of the federal preemption doctrine and contrary to federal decisions construing the

scope and effect of the Carmack Amendment. A uniform federal rule regarding liability for damaged interstate shipments is essential to the proper operation of federal regulation of interstate freight shipments. The decision of the Texas Supreme Court destroys that uniformity. Accordingly, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Texas.

Respectfully submitted,

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No. 80-696

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN TRANSFER & STORAGE CO.,
Petitioner,

versus

RAYMOND J. BROWN,
Respondent.

On Writ of Certiorari to
The Supreme Court of Texas

BRIEF AS AMICI CURIAE OF SOUTHWEST WAREHOUSE & TRANSFER ASSOCIATION AND OTHER INTERESTED MOTOR CARRIERS

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SUPREME COURT OF THE UNITED STATES
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AMERICAN TRANSFER & STORAGE CO.,
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versus

RAYMOND J. BROWN,
Respondent.

On Writ of Certiorari to
The Supreme Court of Texas

BRIEF AS AMICI CURIAE OF SOUTHWEST WAREHOUSE & TRANSFER ASSOCIATION AND OTHER INTERESTED MOTOR CARRIERS

Southwest Warehouse & Transfer Association, Inc.; United Van Lines, Inc.; Allied Van Lines, Inc.; North American Van Lines, Inc.; Central Freight Inc. and Central Forwarding Inc. hereby respectfully file the following Amici Curiae Brief in support of the petition

for a Writ of Certiorari filed by American Transfer & Storage Co.

INTEREST OF AMICI

The amici curiae are Southwest Warehouse & Transfer Association, Inc.; United Van Lines, Inc.; Allied Van Lines, Inc.; North American Van Lines, Inc.; Central Freight Inc. and Central Forwarding Inc. Southwest Warehouse is an association of 144 moving and storage companies with principal offices in Texas, Louisiana, New Mexico, Oklahoma and Arkansas. By far the majority of the members are movers of household goods headquartered in Texas. United Van Lines, of Missouri; Allied Van Lines, of Illinois and North American Van Lines, of Indiana are three of the larger carriers of household goods in the United States. Central Freight, of Waco, Texas, is a common carrier of general commodities, and its sister company, Central Forwarding Inc., also of Waco, Texas, is authorized to carry household goods.

Each of the amici conducts business in Texas. A substantial portion of the business of each involves interstate commerce, which produces combined annual revenues in the hundreds of millions of dollars. All of the amici operate not only in Texas but throughout the United States, either directly or through the interlining of shipments with other carriers. If the decision in question of the Texas Supreme Court is allowed to stand, each of the amici and their interstate commerce

businesses will be subject to and adversely affected by the mandatory multiple damage provisions of the Texas Deceptive Trade Practices and Consumer Protection Act (Tex. Bus. & Comm. Ann. §17.41, et seq.) (DTPA).

The amici are, therefore, vitally interested in the outcome of this litigation and urge that this Court consider the petition.

ARGUMENT

REASONS FOR GRANTING THE WRIT

This Court should review the decision of the Texas Supreme Court for two reasons:

1. There are conflicts between the Carmack Amendment and the Texas DTPA which the Texas Supreme Court has either ignored or sought to distinguish on superficial grounds.

2. The application of the Texas DTPA to interstate shipments will have widespread and profound effects on carriers and shippers not only in Texas but throughout the entire United States and will materially and adversely affect uniformity in rates and damages sought to be achieved by the Carmack Amendment.

I.

There Are Conflicts Between The Carmack Amendment And The Texas Deceptive Trade Practices Act Which The Texas Supreme Court Has Either Ignored Or Sought To Distinguish On Superficial Grounds.

The principal reason relied on by the Texas Supreme Court for holding the Carmack Amendment [49 U.S.C. §20(11)] inapplicable appears to be the following:

> [A] DTPA suit for misrepresentation made prior to contract does not fall within the ambit of federal regulations. (601 S.W.2d at 938).

Respondent Brown urges similarly that his cause of action "exists separate and apart from the contract of carriage and is totally unrelated thereto." (Respondent's Brief in Opposition, p. 11).

Perhaps, speaking theoretically, it may be argued that the representations in question were totally unrelated to the contract of carriage. This is understandable when respondent's desire to obtain treble damages, as opposed to released value damages, is considered. Amici curiae submit, however, that such distinction is superficial and will not withstand scrutiny.

The representations in question cannot be viewed in a vacuum. They are directly related to the nature and

quality of services to be rendered in an interstate contract of carriage. The representations themselves do not cause damage or injury to anyone. Had respondent decided not to use the services of petitioner, and had no contract been entered into, or if petitioner had shipped the goods without damage, then, obviously, there would be no lawsuit. It is only as a result of entering into the interstate contract of carriage and the subsequent damage to property during the interstate move that respondent was injured and has a cause of action. To say that the contract of carriage is "totally unrelated" to the cause of action is sophistry at its extreme.

It might be argued as a ground for distinction that causes of action under the DTPA are akin to fraud and that the state has a deep rooted interest to protect its citizens against such acts, as was stated by the Texas Supreme Court (601 S.W.2d 938). Amici curiae respectfully disagree with this holding in that if there is a true conflict between the state statute and the federal statute whereby the former impairs the federal superintendence of the field, the state statute cannot stand, no matter how deeply rooted the local interest.

While the Texas DTPA is frequently mentioned as an anti-fraud statute, no fraudulent intent, or intent of any nature, is required for there to be a violation or an awarding of multiple damages. In the recent Texas Supreme Court case of *Singleton v. Pennington*, 23 Tex. Sup. Ct. J. 587 (Sept. 20, 1980) the plaintiff accused the defendant of violating the same subsections of the

Texas DTPA as are involved in this case. [§17.46(b)(5) and (7)]. The defendant urged that he should not be held liable for mandatory treble damages for representations if he did not know that they were false. The Supreme Court disagreed and held that it "would not read into [Subsections 5 and 7] an intent requirement. . . ."

The article of a noted expert in the area emphasizes that it is a misconception that there must be fraud, deception or misleading conduct for there to be a violation of the Deceptive Trade Practices Act. Elias, *The DTPA: The All-encompassing Buyer Remedy in Texas,* 43 Tex. B.J. 745 (1980). The buyer has the option of a DTPA suit "when product quality or performance is defective or inadequate, *regardless of whether the seller was guilty of any deceptive or misleading conduct in making the sale.*" (*Id.* at 745) (Emphasis added). He later states: "The seller's knowledge, intent, or general state of mind is irrelevant. Thus, an innocent misrepresentation is as much a violation of DTPA §17.46(b)(7) as an intentional one. See *Spradling v. Williams,* 566 S.W.2d 561 (Tex. 1978)." (*Id.* at 754, n. 48).

It should be noted that there were no findings by the jury in the instant case that American Transfer had any fraudulent intent or knowingly made any misrepresentations. The jury found only that American Transfer represented to Brown that the moving services of American Transfer "(1) would include benefits and characteristics which they did not include [Subsection

5]; and (2) were of a particular standard, quality or grade, when in fact, they were not [Subsection 7]."

Much of what is prohibited by the DTPA would, but for inclusion within the Act, traditionally be considered purely a breach of contract. For example, DTPA §17.50 awards multiple damages for breaches of express or implied warranty, usually considered contractual or quasi-contractual. Representations under Subsections 5 and 7 are in essence express warranties. Professor Elias observes that: "the representations [set out in Subsection (7) of §17.46(b)] would probably also create express warranties. . . ." (Elias, *supra*, at 748).

A warranty, of course, is by its very nature, a contract. *Compagnia Italiana Transporto Olii Minerali v. Sun Oil Co.*, 43 F.2d 683, 685 (2d Cir. 1930); *Dunn v. Texas Coca Cola Bottling Co.*, 84 S.W.2d 545 (Tex. Civ. App. - Eastland, 1935, writ dism'd w.o.j.); 77 C.J.S. *Sales* §302c (1952) ["a warranty . . . is itself a contract."]; 67 Am. Jur. 2d *Sales* §425 (1973).

Are the representations by American Transfer in the instant case any less contractual in nature? Does classification of the cause of action by the Texas Supreme Court and respondent as a deceptive trade practice in itself successfully avoid the contractual nature of the representations and applicability of the Carmack Amendment?

This Court has traditionally examined with a careful and an analytical eye similar attempts to circumvent the provisions of the Carmack Amendment by characterizing the cause of action as something other than a breach of the interstate contract. Note the plaintiffs' various suggested causes of action (in parentheses) and this Court's responses. In *Southeastern Express Co. v. Pastime Amusement Co.*, 299 U.S. 28 (1936) (per curiam) (negligence causing untimely delivery) this Court held that the words of the statute were "comprehensive enough to embrace all damages resulting from any failure to discharge a carrier's duty with respect to any part of the transportation to the agreed destination." (*Id.* at 29).

In *Georgia, Florida & Alabama Railway Co. v. Blish Milling Co.*, 241 U.S. 190 (1916) (trover and conversion) this Court chose to recognize the substance, rather than the form, of the asserted cause of action: (*Id.* at 197)

> The action is in trover, but, as the state court said: 'If we look beyond its technical denomination, the scope and effect of the action is nothing more than that of an action for damages against the delivering carrier.' 15 Ga. App. p. 147.

Of similar effect is *American Railway Express Co. v. Levee*, 263 U.S. 19 (1923) (trover and conversion): "The law of the United States cannot be evaded by the forms of local practice." (*Id.* at 21).

It is the position of amici curiae that once this Court looks beyond the "technical denomination" placed on respondent's cause of action by the Texas Supreme Court or the "forms of local practice," it will see that the scope and effect of the action is nothing more than one for damages against American Transfer relating to the interstate contract of carriage.

We have found no opinion of this Court which has considered the validity of the application of a statute similar to the Texas DTPA to interstate moves. There is at least one Texas case which has, however, applied the DTPA to facts which this Court has held in another case were governed by the Carmack Amendment.

In *National Van Lines, Inc. v. Lifshen,* 584 S.W.2d 298 (Tex. Civ. App. - Dallas 1979, no writ) (opinion by Chief Justice Guittard), plaintiff sought treble damages under the DTPA based on defendant's representations (in Wisconsin) including "representations concerning the time necessary to complete the move." (*Id.* at 299). Chief Justice Guittard sustained the trial court's award of treble damages, reasoning that the Carmack Amendment did not apply because the case involved acts or practices which occurred "before the parties entered into the contract of carriage." (*Id.* at 300).

We find no material factual distinctions between *National Van Lines* and the facts in the opinions of this

Court in *Atchison, Topeka, & Santa Fe Railway Co. v. Robinson,* 233 U.S. 173 (1914) and of the Fourth Circuit in *Sorensen-Christian Industries, Inc. v. R.E.A.,* 434 F.2d 867 (4th Cir. 1970) where pre-contract representations about the time and quality of the shipment were made but not fulfilled. In both, the Carmack Amendment prevailed. In the latter, R.E.A.'s agent assured plaintiff "that there would be no question of [the shipment's] arriving on time," (*Id.* at 868), but admitted at trial that plaintiff "did not get the service it had paid for." (*Id.* at 869).

The crucial facts of *Robinson, Sorensen,* and *National Van Lines* are the same; only the technical denomination of the cause of action used to circumvent the Carmack Amendment differed.

The DTPA conflicts with the Carmack Amendment not only in the amount of allowable damages, but also in limitations of liability. In this respect, the case of *Adams Express Co. v. Croninger,* 226 U.S. 491 (1913) is in point. In *Adams* Kentucky had enacted a statute nullifying contracts which limited the liability of carriers to declared value. Kentucky's attempt to allow the plaintiff recovery over the declared value was held by this Court to conflict with the Carmack Amendment and, therefore, was invalid.

In the instant case American Transfer also raised the declared value as a limit to its liability. The Texas Supreme Court, (601 S.W.2d at 938) while not directly discussing this point, cited with approval the holding

and reasoning of the Court of Civil Appeals: (584 S.W.2d at 291)

> [W]e hold also that §17.42 [which forbids waivers by consumers of rights under the DTPA] is effective to nullify any contractual limitation of liability insofar as this action is concerned.

Amici curiae submit that the conflict presented by §17.42 of the DTPA, insofar as it relates to interstate contracts of carriage, is, as was held by this Court in *Adams Express*, an impermissible interference with Congress' power in interstate commerce.

II.

The Application Of The Texas Deceptive Trade Practices Act To Interstate Shipments Will Have Widespread And Profound Effects On Carriers And Shippers Not Only In Texas But Throughout The Entire United States And Will Materially And Adversely Affect Uniformity In Rates And Damages Sought To Be Achieved By The Carmack Amendment.

Consider first the magnitude of the damages allowed. The DTPA in effect at the time of the shipment in question called for the mandatory awarding of treble damages and attorney's fees, regardless of intent. *Woods v. Littleton*, 554 S.W.2d 662 (Tex. 1977). *Singleton v. Pennington*, 23 Tex. Sup.Ct. J. 587. Even Chief Justice Guittard of the Court of Civil Appeals, on whose opin-

ion the Texas Supreme Court relied so heavily in the instant case, has stated his view that "the remedy of treble damages is Draconian. . . ," especially where there is no intentional deception. *Singleton v. Pennington*, 568 S.W.2d 367, 372 (Tex. Civ. App. - Dallas 1977).

We emphasize the severity of the remedy allowed at this point not solely for the purpose of demonstrating what Texas parties must face; indeed, the harsh effects are not geographically restricted. The DTPA allows a local defendant to obtain indemnity or contribution from another party causing all or part of the harm (DTPA §17.55A).

Section 17.55A is particularly applicable to the types of transactions under consideration in the instant case, i.e. interstate contracts of carriage. As the Court is no doubt aware, several carriers in different states may be involved in the handling, pickup, transportation or delivery of an interstate shipment. The consumer usually deals only with one of the involved carriers, as Mr. Brown did with American Transfer. It is not necessarily that carrier, however, which commits acts which might be considered deceptive trade practices. For example, the initiating carrier may, based on promises or past practice of a connecting line carrier, in good faith represent that a shipment will be delivered by a certain time or handled in a certain way. If the connecting line carrier fails to perform as represented, the initiating carrier is responsible under the DTPA but

may, if sued by the consumer, seek indemnity from the connecting line carrier for all of the multiple damages and attorney's fees.

The facts just posed are not hypothetical. Evidence in the present case indicates that a connecting carrier in the State of Washington is responsible for some, if not all of the actual damage caused to the shipment. American Transfer has filed suit against that carrier in Washington for indemnity.

In addition, a shipment which is initiated out of Texas and destined for Texas may result in liability for the initiating carrier, even though he may be totally unfamiliar with the Texas DTPA. In *National Van Lines, Inc. v. Lifshen*, 584 S.W.2d 298, the defendant was held liable in Texas for treble damages (including delay damages) as a result of representations made by defendant's agent in Milwaukee, Wisconsin. Every carrier outside of Texas who makes representations, though innocent and in good faith, about the quality or nature of the move to Texas, will face potential damages far in excess of those to which he would be subject for moves to other states.

Consider also the fact that many of the other states have consumer protection statutes of one form or another. The causes of action and damages allowed are not uniform, however. See 2 *Consumer Law Handbook* 180 (1972). Some states allow punitive damages; some do not. Some award civil or criminal penalties; others do not. The differences are, at the very least, numerous.

Quite probably, they are unfathomable to a carrier who must try to ascertain his potential liabilities.

Furthermore, how can a carrier effectively figure his rates when he is subject to treble damages for a shipment to one state, actual damages to another or civil or criminal penalties to a third. If, as stated by this Court in *Southeastern Express Co.*, 299 U.S. at 29, "the underlying principle is that the carrier is entitled to base rates upon value and that its compensation should bear a reasonable relation to the risk and responsibility assumed," how can he possibly determine his rates without examining the various deceptive trade practices and consumer protection acts for each state through which that particular shipment travels? The broad purpose of the federal act, "to compel the establishment of reasonable rates and to provide for their uniform application" (*Id.* at 29), will become an impossibility.

SUMMARY OF ARGUMENT

The Texas Supreme Court and respondent have woven a fine semantic cloth which merits the closest examination by this Court. The basic reasoning of the Supreme Court of Texas is at the very least superficial and questionable. Yet if the opinion in *American Transfer* is allowed to stand, the results will be widespread and profound. Is the issue so clear that the unquestioned effect on uniformity of rates and liability in interstate

commerce can pass unnoticed and unwritten on by this Court? Can it seriously be argued as suggested by respondent that the representations of American Transfer about the manner in which it would carry out the interstate shipment are "totally unrelated" to the interstate contract of carriage? We think not.

The words of this Court in *Adams Express Co. v. Croninger*, (226 U.S. at 506) are particularly pertinent:

> To hold that the liability therein declared may be increased or diminished by local regulation or local views of public policy will either make the provision less than supreme, or indicate that Congress has not shown a purpose to take possession of the subject. The first would be unthinkable, and the latter would be to revert to the uncertainties and diversities of rulings which lead to the amendment.

CONCLUSION

Amici curiae urge, due to the obvious and overwhelming importance of the issues presented on the transportation of goods in interstate commerce, that this case warrants the full analysis of briefs on the merits and consideration by this Court. Amici curiae, therefore, respectfully request that the petition of American Transfer & Storage Co. for a Writ of Certiorari be granted.

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